THE LAW QUARTERLY REVIEW.

No. XXXII. October, 1892.

NOTES.

ONE word more on *Henthorn* v. *Fraser*, '92, 2 Ch. 27, C. A. The only new point it decides is that, where contracting parties are not face to face throughout their communications, the making of an offer otherwise than by post is consistent with the offeree being authorised to accept by post, and being bound by the contract and entitled to hold the offeror to it from the moment of posting the acceptance. But the notion of an implied request or authority from the proposer to the acceptor is practically abandoned by both Lord Herschell and Kay L.J. (Lindley L.J. not committing himself on this point), and the rule is put on the ordinary use of the post being within the common contemplation of the parties. Upon this one may note two things:—

a. The result is hardly distinguishable from a fixed rule that, unless a contrary intention appears, the acceptance of every offer of a contract may be communicated through the post, and completes the contract as from the time of posting, whether the offer were made by post or not.

b. The rule is more certain but also more arbitrary than before. In the theory of implied authority we had a reason, though an artificial one, why the proposer rather than the acceptor should take the risk of an acceptance sent by post being delayed or miscarrying. Now we have none. Perhaps, after all, the most philosophical view of this vexed question is that it is one of those matters of practical life where (as with the rule of the road) it is necessary to have a fixed rule of some kind, though difficult to find conclusive reasons for preferring one rule to another. F. P.

X died seised of land in fee simple, intestate and a widower, leaving a son *Y* and a first cousin *Z*. Are there any and what circumstances in which *Z* can inherit the land rather than *Y*?

H. W. E.

'There is in fact no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.' (*Willis* v. *Baddeley*, '92, 2 Q. B. (C. A.) 324, 326.)

These are the words of an eminent and sagacious judge. They have an air of plain common sense. But they in fact countenance a singular delusion, which we had supposed to have been banished by the labours of Sir Henry Maine from the field of jurisprudence. It is certain that the judges profess only to expound the law. It is equally certain that the judges do, under the fiction of expounding the law, constantly make the law. To apply a law to circumstances to which it has not been authoritatively pronounced applicable, is in fact to legislate. But, to speak plainly, our judges (under which term of course we include the whole line of Chancellors) have gone far further than this. They have, under the form of interpretation, built up whole departments of law. They have not the least reason to be ashamed of their work. The best and the most rational portions of the law of England are the product of judicial legislation. The whole law of contract, to take one example, has been, with very rare exceptions, created by the judges. It may well be doubted whether this branch of the law would not gain both in symmetry and reasonableness by the repeal of every statutable enactment which affects it. We object to Lord Esher's dictum both because it is to our minds based on a misconception as to the mode in which law is developed and because the fallacy it contains impedes the freedom of judicial action. England would gain a good deal if there were less Parliamentary and more judicial legislation. There is after all nothing strange in the fact that Lord Esher and his colleagues should be better legislators than the last batch of newly-elected M.P.s.

'There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause.' Thus the House of Lords in *Wing* v. *Angrave* (8 H. L. Cas. 183). Perhaps it would be better if there were, as is the case in the civil law and the Napoleonic code: for here in *In the Goods of Alston* ('92, P. 142) we have a captain and his wife drowned together after making identical wills in favour of one another, with a gift over in case of one predeceasing the other. No evidence being forthcoming of predecease the matter becomes, in the words of Lord Cranworth, 'incapable of solution,' with the result that there is an intestacy and defeat of the testators'

intentions. However, it is not the business of the law to supply facts or to guess at them. Presumptions of law are founded on an experience of what generally happens. In the case of drowning together the data are at present insufficient to show which in fact most often survives.

The apprehensions raised among men of business by the decision of the House of Lords in *Lord Sheffield's* case, 13 App. Ca. 333, will, it is to be hoped, be laid by the reversal of the Court of Appeal's excessive following of that decision in *London Joint Stock Bank* v. *Simmons*, '92, A.C. 201. We are now to understand that *Lord Sheffield's* case did not affect any principle of mercantile law, but proceeded wholly on the actual notice of the pledgor's limited title which the Bank was held to have had in the special circumstances of that case. But is it altogether satisfactory when judgments in the House of Lords are so framed as to mislead even the Court of Appeal?

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6, 1 (*d*) provides that 'a creditor shall not be entitled to present a bankruptcy petition against a debtor unless' (*inter alia*),

'(*d*) The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England.'

These words are in form purely negative, but a writer so acute and generally, it must be added, so thoroughly trustworthy in his conclusions as Mr. Westlake, has pronounced it the 'better opinion' that these words 'should be read positively as well as negatively so as to give the creditor a right to present a petition in the cases mentioned in them wherever the act of bankruptcy was committed' (Westlake, Private International Law (3rd ed.), p. 148). *In re Pearson*, '92, 2 Q. B. (C. A.) 263 is a judicial decision against the view advocated by Mr. Westlake. 'Sect. 4,' says the Master of the Rolls, 'states affirmatively what are to be acts of bankruptcy. Sect. 6 is a negative section, and does not, in my opinion, affect in any way the construction of sect. 4. Unless a case can be brought within sect. 4, it is not necessary to look at sect. 6. If the case is brought within sect. 4, and the debtor is a foreigner, it must also be brought within sect. 6. But, if the case is not within sect. 4, there is nothing in sect. 6 which can bring it within the jurisdiction of the Court. Sect. 6 is only negative.' The result of this view of the Act is that *Ex parte Blain* (1879), 12 Ch. D. 522, is still law and that the Court has no jurisdiction under the Bankruptcy Act, 1883, to allow the

service of a bankruptcy notice upon a foreigner out of the jurisdiction, even though he be domiciled in England, or within a year before the date of the presentation of the petition has had a place of business in England. This exposition of the law coincides with the strict words of the Act. It is however to be regretted that the attention of the Court was not, as far as appears from the Law Reports, called to Mr. Westlake's dictum. He is one of those rare writers whose dicta rarely turn out unfounded.

Goulder v. *Goulder*, '92, P. 240, does not establish or invalidate any principle of law. It shows, however, the curious way in which under the complicated circumstances of modern life people may become connected with various different countries. *D* and *M* his wife are both born in France of parents born in England, but resident in France. They are married in England, but they subsequently reside in France. *D* on coming of age declares his intention to retain his English nationality, and it rather appears that both he and his father intend to return to England when they each should have made a fortune. *D* deserts his wife and leads an unsettled life in New Zealand and the Australian Colonies. *M* petitions for divorce from *D* on the ground of adultery and desertion. The Court holds it has jurisdiction to grant the divorce. The ground of jurisdiction is that *D*'s domicil of origin is English and has never been given up. On the facts of the case the decision is apparently sound, but it is difficult not to feel that there is something arbitrary in the principle which bases the jurisdiction of the Court on the so to speak accidental and irrelevant fact whether *D*'s father did at the time of *D*'s birth contemplate returning to England.

A contributor whose opinion is entitled to great weight asks:—Is the judgment of Hawkins J. in the *Carbolic Smoke Ball case*, '92, 2 Q. B. 484, good law?—and suggests the following objections:—The contract between Mrs. Carlill and the Carbolic Smoke Ball Co., if it existed, may be thus stated. The company makes a general offer to any person that in consideration of his using the smoke ball—not, be it remarked, purchasing it—for a fortnight, the company will, if such person at any time afterwards catches influenza or 'any disease caused by taking cold,' pay him £100 reward; the company, in short, offers a conditional promise to anyone who uses one of the company's smoke balls for a fortnight. The offer is accepted by the performance of the consideration, i.e. by using the smoke ball for a fortnight. Mrs. Carlill, having seen the advertisement, uses the smoke ball for a fortnight. She thereby both accepts the company's offer and performs the consideration for the company's

promise, and thereupon becomes entitled to receive £100, if the judgment of Hawkins J. be right, when she falls ill with the influenza [*quaere*, within what time afterwards? This point is not dealt with: in fact it was some very short time. We must take it that the Court read 'after having used,' &c., as 'within a reasonable time after.'—ED.]. The contract certainly is a very odd one, and the more odd when we notice that ten people might well use the same ball for a fortnight, and thus any one of ten people, of whom not more than one had purchased the ball, would be entitled to receive £100 from the company the first time he caught a cold.

1. The first difficulty is to find the consideration for the company's promise. The use of the smoke ball may, however, be a sufficient consideration.

2. The contract, if it exists, looks uncommonly like a wagering contract. This objection Mr. Justice Hawkins perceives. He meets it by the remark that 'it is essential to a wagering contract that each party may under it either win or lose—whether he win or lose being dependent on the issue of the event, and therefore remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.' Surely this will hardly stand examination. Suppose that *X* says to *A*, 'if you will render me a particular service I will pay you £1 in case a particular horse wins the Derby,' does anyone doubt that this is a wager? [We do doubt it. Suppose the service was training the horse, with an extra payment if he won?—ED.] The truth is that Mr. Justice Hawkins's argument involves him in a dilemma. If *A* renders any consideration to *X* for his promise by the use of the smoke ball, then if *A* does not catch a cold *A* loses the value of his consideration, i.e. he gives it for nothing. If, on the other hand, *A* gives nothing, and loses nothing, by using the smoke ball, *A* gives no consideration for *X*'s promise. The contract which arises in the Smoke Ball case is then either a wagering contract or a contract made without any consideration. In either case it is void.

3. It is essential to the formation of a contract that the promisor should have intended to be legally bound to the promisee to perform his promise, or at any rate that the promisee should from the acts of the promisor have reasonably supposed that the promisor intended to enter into a legal obligation. Can it fairly be deduced from the facts of the Smoke Ball case that such an intention really existed? Was not this a question of fact which at any rate ought to have been left to the jury? The offer being in writing, the question was perhaps wholly one of interpretation for the judge. But even on this view the inference that the company

really meant to enter into a binding contract is a very dubious one. A puff is not a promise. On this point no help can be got from the 'reward cases' such as *Williams* v. *Carwardine*. When *X* offers to pay *A* £20 if *A* gives information leading to the conviction of *M* for the murder of *N* there can be no doubt that *X* does mean to incur a legal debt to *A* if *A* affords the requisite information.

[We think the Court was justified in being astute to hold the defendants liable: people ought not to be allowed to advertise their wares by means of illusory warranties. As a matter of advertising policy, one would think it would have suited the company better to pay; but that was the company's affair. We agree that the vague terms of the promise give rise to difficulty. Considering the company's statement that 'one carbolic smoke ball *will last a family* several months,' the offer can hardly be construed as confined to actual buyers, which otherwise it perhaps might have been; and thus Mr. Graham's ingenious argument that the transaction 'amounted to a contract of warranty of prevention of disease with liquidated damages in the event of breach' appears to lose its foundation; for there cannot well be one kind of contract with buyers and another with users who did not buy. But we have no doubt the company was estopped from saying it meant nothing, and on the point of the contract being a wager we think the decision right.—ED.]

All the nice questions of legal casuistry raised by *Read* v. *Anderson* (1884), 13 Q. B. D. (C. A.) 779, and *Cohen* v. *Kittell* (1889), 22 Q. B. D. 680, and cases of the like kind, have lost their interest. The Gaming Act, 1892 (55 Vict. c. 9), s. 1, puts an end to the chance of any betting agent ever again recovering or attempting to recover by action at law commission for his services. The only thing to be regretted is that the Gaming Act, 1892, did not once and for all give to the Gaming Act, 1845, 8 & 9 Vict. c. 109, its natural, and probably intended, effect by freeing the Law Courts entirely from the necessity of ever attending to any dispute arising from or connected with a bet. The making of wagers will never cease, but there is no reason why the Courts should not entirely cease to enforce any claim either arising from or connected with a bet. It is at any rate time that the law of wagering should be placed on a clear and intelligible basis. The distinction as to securities between wagers which do, and wagers which do not, fall within the Gaming Act, 1835, 5 & 6 Will. IV, c. 41, should clearly be done away with. No political party in the State is interested in the legal protection of gambling, and there is therefore no apparent reason why either the Government or a private member should not carry a measure giving the fullest effect to the policy of the Gaming Act, 1845.

Questions of wagers and of betting cause hopeless perplexity to magistrates and to judges. *X* is convicted under 36 & 37 Vict. c. 38, s. 3, of the offence in substance of betting and gaming in a public place. The conviction is quashed and *X* escapes punishment because his offence is not described in the information with the minuteness required by the Act. The decision of the Court in *Ridgeway* v. *Farndale*, '92, 2 Q. B. 309, is, considering the words of the Act, clearly right. Might it not, however, be possible to draw Acts against betting, and the like offences, in language clear and wide enough to make it impossible for a man who has in substance broken the law to escape punishment on account of a merely technical error in the description of his offence?

Reg. v. *Russett*, '92, 2 Q. B. 312, raises a question which in one form or another has constantly perplexed the Courts. Can *X* be found guilty of larceny when *X* has obtained possession of the goods alleged to be stolen by a trick, but in a certain sense with the assent of *A* their owner; or in other words, what is the precise line which separates larceny from the crime of obtaining goods by false pretences? *X* agrees at a fair to sell a horse to *A*, the prosecutor, for £23, whereof £8 is to be paid to *X* at once and the remainder upon the delivery of the horse. *A* gives £8 to *X*. *X* removes the horse from the fair and never intends to deliver the horse to *A*. *X* is held guilty of larceny. The principle laid down by the Court is that 'if the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, that is larceny.' 'This,' adds Coleridge C.J., 'seems to me not only good law but good sense.' With this sentiment everyone will agree. It is clear that *X* committed a crime. It is satisfactory that he was convicted and punished, but it is not quite so satisfactory that the judges have drawn very subtle distinctions in order to bring under the head of larceny crimes which come more logically under the head of obtaining money or goods by false pretences. The necessity for these subtleties ought not to exist. Why should not the judges be allowed within certain limits to direct a jury, whatever the form of an indictment, to find a cheat guilty of the offence, whatever it is, that he has really committed? or what advantage is there in maintaining elaborate and nice distinctions between different forms of criminal fraud? These questions are easier to ask than to answer Many years ago Mr. Justice Wright prepared a criminal code for some of the West Indian colonies, which remains in the pigeon-holes of the

Colonial Office. In that draft he boldly proposed to class all forms of fraudulent misappropriation as one substantive offence.

'The grave and difficult question in this case [*Hanbury* v. *Hanbury*, '92, P. 222] is whether insanity is a defence to a suit of this kind [i. e. a divorce suit]. Thus broadly stated, so far as I am aware, it has never been decided in this country, and I do not know whether it ever will be, because there is insanity and insanity.'

These are the words of Sir Charles Butt. They are calculated to excite a good deal of reflection in the minds at any rate of lay readers. Surely either the Legislature or the Courts ought to answer definitely the question whether or not insanity can under any circumstances afford a defence to a petition for divorce. The question is one which may vitally concern every married man or woman. The reason given by the late President of the Divorce Court for an answer being impossible is (we say it with the greatest respect), when carefully examined, futile. No doubt there are, as he intimates, different kinds and degrees of insanity. This may show, and indeed does show, that the law ought to discriminate between different kinds of insanity when determining how far the fact of a husband, for instance, being mad should make it impossible for his wife to obtain a dissolution of their marriage; but it does not show that the grave and difficult question whether insanity is a defence to a petition for divorce ought to be left without an answer. The questions determined in the cases of *Mordaunt* v. *Moncreiffe* (1874), L. R. 2 Sc. & D. App. 374, and *Baker* v. *Baker* (1880), 5 P. D. 142, are of course different from the enquiry raised in *Hanbury* v. *Hanbury*; but anyone who considers the effect of these cases must come to the conclusion that it is high time for the Legislature to determine what is the relation between the insanity of a husband or wife and the right to a divorce.

Hearson v. *Churchill*, '92, 2 Q. B. (C. A.) 144, determines directly that an engineer officer in the Royal Navy who has accepted a commission and is borne on the books of a shipping commission cannot resign his commission except by permission of the Crown. The case, however, goes in fact a good deal further, and is in substance an authority for the broad proposition that a naval officer is under no circumstances entitled to resign his commission except by permission of the Crown. That this broad proposition, were its truth denied by the Courts, must of necessity be established by Act of Parliament is clear to anyone who recognises the necessity of maintaining a navy and enforcing naval discipline. What is curious, though custom has blinded Englishmen to the strangeness of the

fact, is that a question which goes to the very root of naval discipline should be submitted to the decision of the ordinary Law Courts. Without any special knowledge of German law, we may feel assured that no officer of the German Navy will ever argue before a German Court that he can resign his commission without obtaining the permission of the German Emperor.

Rolfe v. *Thompson*, '92, 2 Q. B. 196, is a decision under the Sale of Food &c. Act, 1879 (42 & 43 Vict. c. 30), s. 3, and determines that when an inspector takes a sample of milk for the purpose of analysis he is not under the words of that section, which enacts that he shall 'submit the same to be analysed,' bound to submit the whole of the sample for analysis. The decision is in one way important. It shows that the Courts are now determined to resist any attempt to whittle down the effect of enactments meant to protect the public from fraud. There is a good deal to be said both for and against the policy of the Statutes whereof the Sale of Food &c. Act, 1879, is a specimen. Few of us now hold that 'adulteration is a form of competition.' Yet the doctrine of *laissez faire*, though for the moment unpopular, contains some wholesome truth. There is nothing, however, to be said for attempts on the part of the Courts to correct the possible errors of the Legislature. It is most desirable that the judges should give full and fair effect to the policy, whatever it be, approved by Parliament. *Rolfe* v. *Thompson* and *Filshie* v. *Evington*, '92, 2 Q. B. 200, are proofs that the Courts recognise this truth and will give full effect to the economical policy of Parliament.

Of late years there has been some confusion about the rule in *Shelley's* case. It has been called a rule of construction by persons of high authority (we purposely do not mention names). Therefore it is good to see the true doctrine reasserted in unmistakeable terms by the Court of Appeal: *Evans* v. *Evans*, '92, 2 Ch. 173. 'Before reference is made to the rule in *Shelley's Case* or *Archer's Case*, or to *any rule of law*, the first thing is to ascertain the meaning of the words used:' Lindley L.J., p. 184. 'The rule in *Shelley's Case* is no guide to the construction of an instrument; we have to ascertain the construction, and then see whether the rule applies:' Bowen L.J., p. 188. 'The rule in *Shelley's Case*, which is said to be much older than that case, is a rule of law, not a rule of construction:' Kay L.J., *ibid.* The precise point decided is curious, and appears to be new.

The agreement before the Court in *Perls* v. *Saalfeld*, '92, 2 Ch. 149, C. A., defeated itself by being too ingenious. It was in substance the usual agreement by an employee not to compete with

the employer after leaving his service; but it was so framed as to make the employer the sole judge of what business was in the same line as his, and to require the employer's written permission in every case. 'That really makes him the court of appeal over the clerk,' said Bowen L.J. Such a restraint was held to be too wide, and unreasonable. Parties who make agreements of this kind without good advice run great risk of finding their intentions frustrated.

It was one of the standing jokes with Swift and some of his friends to assume that a certain unfortunate Partridge, an almanac maker, was no longer alive. It was in vain for him to protest, because his protests were treated as coming from the other world: whence the coterie of wits extracted no small amusement. It ceases to be a joke, however, when a newspaper persists in falsely asserting that a trading firm has ceased to exist. This is analogous to slander of title, and for it action lies, but the gist of the action, as was long ago decided, is damage. The question in *Ratcliffe* v. *Evans* (40 W.R. 578) was whether evidence by the plaintiff that his business had declined after the circulation of the slander was evidence of special damage sufficient to support the action. To this the Court of Appeal, in an elaborate judgment, have said 'Yes.' The law is not unreasonable, and, if showing a general loss of custom is the only way the plaintiff has of proving damage, it will not deny him reparation for the wrong because he does not give the names of particular customers who have dropped off. To do so would be, as Bowen L.J. says, 'the vainest pedantry.' There are several authorities for this—the popular dissenting preacher who was accused of incontinence and whose congregation fell off (*Hartley* v. *Herring*, 8 T. R. 130, 4 R. R. 614), and the auctioneer (*Hargrave* v. *Le Breton*, 4 Burr. 2422) whose room emptied after the slander was uttered. The case of the young lady who said she had lost 'several suitors' owing to an imputation on her virtue (*Barnes* v. *Prudlin*, 1 Sid. 396), was different, for she might have named them: unless indeed they were as numerous as Penelope's.

Equity, we all know, treats that as done which ought to be done, and following out this principle the late Master of the Rolls, in *Walsh* v. *Lonsdale* (21 Ch. D. 9), held that a person who was in possession under a lease was in as good (or as bad) a position as if the lease had been granted, but in so deciding Sir G. Jessel ('aliquando dormitat Homerus') was thinking only of a judge of the High Court like himself, with jurisdiction to decree specific performance, not of a County Court judge with no jurisdiction. There

the common law still reigns in primeval simplicity (*Foster* v. *Reeves*, '92, 2 Q. B. (C. A.) 255), so the luckless landlord could not get his rent, and the tenant went on his way rejoicing. The point, as Lord Esher remarked, is a puzzling one, but that at this time of day we should have one law administered in one Court, and another in another Court, is something worse than a puzzle; it is very like a scandal.

'Executor de son tort' we know pretty well, chiefly as a phrase useful for frightening people who intermeddle with an estate. 'Trustee de son tort' is a phrase of more vague and uncertain import. 'If it be a sin to be fat and merry,' as Falstaff says, 'God help the wicked;' and if it be a breach of trust to help a widow executrix in a friendly way to carry on her late husband's business (albeit not authorised), to look after the accounts and initial cheques drawn by her, there will not be much disinterested kindness of this sort going about in future. In law the distinction is plain: there is no such control over the trust fund as could constitute the alleged trustee de son tort a trustee at all. In morals it is still plainer. Mankind according to Burns is an 'unco squad,' but this is too mild a description for the unconscionable people who bring such an action as *Barney* v. *Barney* ('92, 2 Ch. 265).

Griffiths v. *Hughes* (76 L. T. R. 760) was an even grosser attempt, fortunately foiled, to make a trustee account for property of the wife which he had advanced to her and her husband, at their request, to pay debts. It was precisely one of those discreditable cases which § 6 of the Trustee Act, 1888, was designed to meet, but the words of the section are 'at the instigation or request or with the consent in writing of the beneficiary.' They include, it is satisfactory to know from Kekewich J., a verbal request. 'Boni judicis est ampliare justitiam.'

Judges are often blamed for not laying down general propositions of law, but the doing so is fraught with danger. For instance in *Cohen* v. *Mitchell* (25 Q. B. Div. 262) we have the Master of the Rolls laying it down that 'until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value in respect of his after acquired property whether with or without knowledge of the bankruptcy are valid against the trustee.' 'Malignant fate sat by and smiled.' For hardly had the words been uttered before there comes *Re New Land Development Association and Gray* ('92, 2 Ch. (C. A.) 138) a case of real estate, and Court of Appeal, No. 2, is obliged to qualify the proposition by admitting that the doctrine has not

the slightest application to real estate. Probably it will be further qualified before long: for the rationale of the doctrine in *Cohen* v. *Mitchell* seems to be that suggested by Cave J. in *Ex parte Woodthorpe* (8 Morr. 236), viz. that it relates to cases in which the bankrupt has been carrying on business without interference by the trustee, in other words with his implied sanction. There must be some estoppel of this kind to displace the trustee's title.

Is an infant a person? Precocious infants are often found not only applying for shares but subscribing a company's memorandum. The infant does not mind, for he is safe and can sing in the presence of the liquidator, but if one of the mystic seven should not be a 'person' the consequences to the company are disastrous. It tumbles down like a house of cards according to the Court of Appeal's decision in *Re National Debenture Corporation* ('91, 2 Ch. (C.A.) 505). It is therefore satisfactory to have Vaughan-Williams J. deciding that an infant is a 'person' (*Re Luxon & Co.* No. 2, 40 W. R. 621) affirming Hall V.C.'s view in *Re Nassau Phosphate Co.* (2 Ch. D. 610). The infant's contract as a subscriber is another thing. It is voidable of course, which means valid till rescinded, but however he elects he is still a 'person' and no subsequent repudiation can disincorporate the company. Infant subscribers are not however to be encouraged, for the result might be (though wildly improbable no doubt) that with seven infants subscribing all the share capital, the company's capital would be wholly illusory.

Tennant v. *Smith*, '92, A. C. 150, decides a matter which we should have thought was almost too obvious to require decision, at any rate by the House of Lords, namely that the privilege of occupying a house which the occupier has no right to sublet or use for his profit, is not income, and is not chargeable with income-tax. The case however is remarkable for Lord Halsbury's statement of the principle governing the construction of taxing Acts. It has, he says, 'been referred to in various forms, but I believe they may be all reduced to this—that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.' This principle, which is often overlooked, is important. There is no such thing as the 'spirit' of a taxing Act. Any judge who construes such an Act must look to its words only. He must not include anything which does not come within them, and, we may add, he must not exclude anything which does come within them. A taxing Act is meant to tax.

1840–1892. A contrast. In 1840 one St. George presents a loaded pistol at one Durant, and is on the point of firing it. St. George's finger is on the trigger, when a bystander seizes his hand and prevents his firing. The prisoner is indicted under 1 Vict. c. 85, s. 3, which makes it a crime to 'attempt' to discharge firearms at another person with intent to do him grievous bodily harm, 'by drawing a trigger or in any other manner.' The prisoner is, under the direction of Baron Parke, acquitted. The ground of the acquittal is that he was prevented from pulling the trigger, and therefore did not attempt to discharge a loaded arm 'by drawing a trigger or in any other manner' analogous to drawing a trigger. The puzzled jury add to their verdict, 'we think that he presented the pistol with intent to discharge it, the pistol being loaded,' and clearly fail to appreciate the merit of Parke's subtlety. (See *Reg.* v. *St. George*, 9 C. & P. 483, 493.) In 1892 one Duckworth follows in the footsteps of St. George. He presents a loaded pistol at his mother, whom he had already threatened to kill. He is on the point of firing, when a bystander seizes his wrists and snatches the pistol from him. Duckworth is indicted for exactly the same offence as was St. George, under an enactment, 24 & 25 Vict. c. 100, s. 18, which, as far as the present point is concerned, repeats the terms of 1 Vict. c. 85, s. 3. Duckworth is convicted and duly sentenced. The attention of the judge is called to *Reg.* v. *St George*. A case is stated for the Court. Coleridge C.J. and four other judges unhesitatingly uphold the conviction and overrule *Reg.* v. *St. George* on this point: *Reg.* v. *Duckworth*, '92, 2 Q. B. 83. The maxim that penal statutes are to be strictly construed is no longer applied with Parke's logical rigour.

The publication of a mere copy of the contents of a register of County Court judgments which is kept under an Act of Parliament, and which by law the public are entitled to inspect, is privileged.

This is the effect of *Searles* v. *Scarlett*, '92, 2 Q. B. (C. A.) 56, which satisfactorily carries out the principle established by *Fleming* v. *Newton* (1848), 1 H. L. C. 363. The unsatisfactory point in the judgment of the Court of Appeal is that it does not lay down the broad rule that facts which under the sanction of the Legislature are recorded for the benefit of the public may always be made public without exposing the man who publishes them to an action for libel. The Court, so far from laying down this principle, seems unwilling to overrule *Williams* v. *Smith* (1888), 22 Q. B. D. 134; and further intimates an opinion that the publication of facts contained in a public register would not be privileged if the motive for publishing them were in any sense malicious. We do not for a

moment dispute that this may be good law; but we do contend that as a matter of expediency any man ought to be at liberty to publish (assuming he does so accurately) any facts which the Legislature orders to be recorded for the very purpose of their being known to the public. The report of the contents of a public register should stand in the same position as the accurate report of a trial.

Attorney-General v. *Smith*, '92, 2 Q. B. 289, gives some relief to honest executors. *T* dies, leaving pictures of great value. His executors, who probably knew little of art, make a *bona fide* return of the value of the pictures, placing them far below their real worth. Probate duty is duly paid on the value returned by the executors, and the error is not discovered until *T*'s estate has been fully and finally wound up. The Inland Revenue naturally attempt to recover the duty due on the real value of the pictures. The Queen's Bench Division decide that the claim is made too late, for that the executors have ceased to be 'persons acting in the administration of the estate' within the Customs and Inland Revenue Act, 1881, s. 32. The decision certainly is in accordance with justice, and apparently gives fair effect to the words of 44 & 45 Vict. c. 12, s. 32. There is difficulty enough as it is in the position of an executor. It certainly is not the interest of the public that the discharge of an executorship should become so full of peril that it will not be accepted by any honest man. It is satisfactory to find that strict adherence to the literal sense of the words of a statute has for once conduced to the promotion both of justice and of sound policy.

We take the following note from the new (third) edition of Sir F. Pollock's book on the Law of Torts, where it appears as an addendum:—The normal rights of co-owners as to possession and use may be modified by contract. One of them may thus have the exclusive right to possess the chattel, and the other may have temporary possession or custody, as his bailee or servant, without the power of conferring any possessory right on a third person even as to his own share. In *Nyberg* v. *Handelaar*, '92, 2 Q. B. 202, *A* had sold a half share of a valuable chattel to *B* on the terms that *A* should retain possession until the chattel (a gold enamel box) could be sold for their common benefit. Afterwards *A* let *B* have the box to take it to an auction room. Then *B*, thus having manual possession of the box, delivered it to *Z* by way of pledge for a debt of his own. The Court of Appeal held that *Z* had no defence to an action by *A* to recover the value of his half share. The judgments proceed on the assumption that *B*, while remaining owner in common as to

half the *property*, held the *possession* only as bailee for a special purpose, and his wrongful dealing with it determined the bailment, and revested *A*'s right to immediate possession: see *Penn* v. *Bittleston*, 7 Ex. 152, and similar cases cited in text. *Qu.* whether, on the facts, *B* were even a bailee, or were not rather in the position of a servant having bare custody.—The case adds nothing to the settled principles of the Common Law as to possessory rights and remedies, but it affords an interesting and rather novel illustration.

The language of the Employers' Liability Act (which remains unamended notwithstanding many promises) continues to accumulate minute judicial interpretation: *Willetts* v. *Watt & Co.*, '92, 2 Q. B. 92, C. A. Whether the law be substantially just or not, the clumsiness and intricacy of its existing form have made it all but impossible that it should seem just to the persons most concerned with it.

Market gardening is one of the refuges of the British farmer in these days, and it is certainly hard to stop him from growing tomatoes, grapes, and mushrooms, which do pay, instead of wheat and turnips, which do not pay, merely because he has covenanted to cultivate 'according to the best rules of husbandry practised in the neighbourhood' (*Menx* v. *Cobley*, '92, 2 Ch. 253). Such a covenant is no more than what the law implies from the relation of landlord and tenant, and what the rules to which it refers—the custom of the country—are designed to secure is simply the most beneficial enjoyment of the land compatible with the avoidance of waste. Keeping this in view, the 'best rules' must be construed with reference to the changing circumstances of time and place; in other words, the farmer may grow what he finds the best market for. This is the sense of the thing. No doubt there is such a thing as ameliorative waste by increasing the burden on the land or impairing evidence of title, but market gardening does neither. In *Grand Canal Co.* v. *M'Namee* (L. R. Ir. 1 Ch. 132) the tenant of a disused hotel had turned it into officers' quarters, putting up wooden partitions in the coffee and billiard rooms and stoves for fireplaces. In dismissing a motion for an injunction Lord Ashbourne pointed true the principle 'Was it a reckless desire to destroy or render the premises useless? No! it was to make the premises of use, in the most beneficial way to the owner.'

It would be better taste for directors of a company not to join in the *sauve qui peut* struggle when the ship is sinking, but they do, and hitherto they have done so with marked success, thanks to the unsatisfactory state of the law with regard to their share qualifica-

tions. The cases are numerous and complicated, but they turn as a rule on this, that a duty to qualify is not a contract to qualify. We have now at last, as Lindley L.J. observes, got a form of article which will suffice to fix directors who act without qualification (*Isaacs'* Case, '92, 2 Ch. (C. A.) 158). If the director does not qualify within a month of his appointment he is by this article to be 'deemed to have agreed to take the said shares from the company and the same shall be forthwith allotted to him accordingly.' This turns the duty into a contract, for the director takes office on the terms of the articles. A share qualification is a very efficient, perhaps the best, guarantee for the bona fides of directors, and it ought to be a reality.

By the severe logic of Roman law, children, until the 'senatus consultum Tertullianum,' had no right of succession to their own mother, not being her 'sui heredes.' The Married Women's Property Act does not go so far as to render a wife a stranger to her husband, but it has made her a *feme sole*, and Stirling J. has had to seriously consider whether in doing so it has not disentitled the husband to an estate by the curtesy in her undisposed of realty (*Hope* v. *Hope*, '92, 2 Ch. 336). If this had been the result of our halting legislation it would not be surprising; nothing now in relation to married women, their property and contracts, could be, for, in Burns' words—

> 'Common sense has ta'en the road
> And's aff and up the Cowgate
> Fast, fast the day.'

The key to the difficulty is in the term separate property. Separate property has no meaning apart from coverture and ends with it. While the coverture lasts the wife may hold the separate property or sell it or give it away or will it, 'invito marito,' but if she does none of these things, the husband has his chance at last under the old doctrine of unity. 'But Lord,' as Mr. Pepys would say, 'to see what this once flourishing doctrine is come to.'

'This decision, *which, strange to say, does not appear to be reported elsewhere*, seems to me to be one of great importance upon the law of conversion,' says Collins J., referring to *National Mercantile Bank* v. *Rymill* (C. A.), 44 L. T. 767: *Consolidated Co.* v. *Curtis*, '92, 1 Q. B. at p. 501. Subscribers to the Law Reports ought not to be driven to another set of reports for decisions in the Court of Appeal which the judges think of great importance.

In *Elkington & Co.* v. *Hürter*, '92, 2 Ch. 452, Romer J. took, in our opinion, the sound view. The Courts have gone quite as far as

it is safe to go in the way of treating general terms of promise or expectation as being or including representations or warranties of specific matters of fact. To decide this case otherwise would have been in effect to set up again the now exploded doctrine of 'making representations good' which, about a generation ago, was current in the Courts of certain Vice-Chancellors.

Shortly after *Cochrane* v. *Moore* was reported, 25 Q. B. Div. 57, it was submitted in this REVIEW (vi. 449) that the Court of Appeal did not mean to lay down that formal manual delivery is needed to perfect a gift of chattels in cases where a real delivery is not practicable, by reason *e.g.* of the donee already having possession or custody. The view so propounded as the result of principle and of the older authorities appears to be confirmed by *Kilpin* v. *Ratley*, '92, 1 Q. B. 582, which indeed may be said to go a little farther, for the custody of the goods was with the donee's husband.

The Water Companies (Regulation of Powers) Act, 50 & 51 Vict. c. 21, is duly noted in the separate Appendix to Elphinstone and Clark on Searches (p. 117) as adding to the possible terrors of a purchaser within the Metropolis. The case of *East London Waterworks Co.* v. *Kellerman*, '92, 2 Q. B. 72, shows that the purchaser is personally liable for water-rates in arrear, so that the caution of the learned writers is more than justified.

The important cases of *Companhia de Mocambique* and *De Sousa* v. *British South Africa Co.*, '92, 2 Q. B. 358, C. A., will be the subject of an article in our next number. At present we will merely say that the judgment delivered by Wright J. appears to have been, at all events, the judgment which a Court of first instance was bound by the existing authorities to give.

That well-worn maxim of both the common and the civil law, *quidquid plantatur solo solo cedit*, has received its latest application at the Antipodes. In the New Zealand case of *Masefield & Rotana* (10 N. Z. L. R. 169) the plaintiff Masefield sold a steam engine and other chattels to one Park, and took from Park a bill of sale by way of mortgage over the same. Park intended to erect the machinery on land he had leased from Himiona (a Maori), but by mistake he put it up on, and affixed it to, land of the defendant Rotana (another Maori), to which he had no title. He did not discover his error until the machinery had been erected and was working. Park became bankrupt, and after his bankruptcy was sent by Masefield to demand possession from Rotana. The astute

aboriginal, however, by this time had made himself aware of the law of fixtures, and refused to deliver up the machinery—alleging in effect that it now formed part of his freehold. And so found Mr. Justice Conolly, and the majority of the Court of Appeal (N. Z.) regretfully adhered to his decision. Mr. Justice Denniston, indeed, in an elaborate dissenting judgment refused to do so, declining to be bound by 'the rigid and logical application of an ancient maxim, especially when such application admittedly leads to consequences revolting to sense and justice.' The learned Judge appears to have been much influenced by the American cases, which go far to support his view. Meantime the Maori has triumphed, and the white man is left lamenting the loss of his goods and chattels.

We regret that we were accidentally prevented from noticing in our last issue the loss of our esteemed correspondent, Dr. K. G. König, for many years legal adviser to the British Legation at Bern. Dr. König's knowledge of English law and its literature was extraordinary, and few English law-books of importance failed to be noticed by him in the *Centralblatt der Rechtswissenschaft* or elsewhere. As a critic he was both discerning and generous.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

WANTED—A LAW DICTIONARY[1].

AT our last meeting Mr. Ilbert called attention to the need for an historical edition of the Statutes. I hope the subject will not be allowed to drop, and that some means may be found of giving practical effect to his suggestion. This evening I want to call attention to another missing law-book, which ought, but is not, to be found on our book shelves. We have no such thing as a Law Dictionary, worthy of the name.

Wharton's Law Lexicon is a work of great learning and research —but it is not a dictionary. It is an imperfectly developed encyclopædia. It no doubt explains a great many legal terms, antiquated and modern, but it is mainly devoted to little treatises on various points of law, arranged in alphabetical order. But the true function of a dictionary is to deal with what one may call the nominal, as opposed to the real, value of legal terms. When a term is ambiguous, you want its various meanings to be clearly explained, and illustrated if possible by apt quotations. You do not want to know merely its ordinary meaning or what, in the opinion of the writer, may be its proper meaning, but you require to have pointed out all the senses in which it is used. Take for instance the term 'indorsement.' Primarily it means any writing on the back of a written instrument, but when the term is applied to a bill of exchange it has a triple derivative sense. The custom was for the holder of a bill to write his name on the back, and hand it over to another person, thereby signifying that he transferred the property in the bill, and gave his personal guarantee for its due payment. All those elements were formerly connoted by the term 'indorsement of a bill.' But now it has been held that an indorsement on the face of the bill is as good as an indorsement on the back. It may be an abuse of language to call a writing on the face of a bill an indorsement, but that is not to the point, if in fact the term has been judicially applied to such a writing. Again, you may have an indorsement which transfers the property in a bill, but which contains no guarantee by the indorser that the bill shall be honoured; as for example when a bill is indorsed without recourse. Further, if a person who is not the holder of a bill backs it with his signature, he thereby incurs the liability of an indorser,

[1] Paper read at the Oxford Law Club, 21 May, 1892.

and his signature is commonly called an indorsement, as we have no term corresponding to the French term 'aval.' But such a signature obviously in no way affects the transfer of the instrument. Here then we have one original, and three distinct derivative meanings attached to the term 'indorsement,' that is to say: 1. A writing on the back of a written instrument. 2. A signed writing by the holder of a bill or note transferring the property therein, and guaranteeing the due payment thereof. 3. A signed writing by the holder of a bill or note, transferring the property therein, though not guaranteeing its payment. 4. A signed writing on a bill or note, whether the signer be the holder or not, which guarantees the due payment of the instrument. But I am not aware of any book where a student would find these different meanings discriminated and illustrated. Wharton certainly throws no light on the subject.

I think a dictionary such as I am suggesting should (*inter alia*) collect definitions from standard authors of different periods; and it would be important that citations either from authors or cases should be dated. As law developes and changes, so the meanings of the terms used develope and change. Let me take another illustration from bills of exchange. A bill of exchange in its origin was an instrument by which a merchant who lived in one place, could pay his debt to a creditor who lived in another place without the transmission of cash. It was in fact a device to avoid the necessity of transmitting cash from place to place. The definition given in Comyn's Digest brings this theory out clearly. 'A bill of exchange,' he says, 'is when a man takes money in one country or city upon exchange, and draws a bill whereby he directs another person in another country or city to pay so much to *A* or order for value received of *B* and subscribes it.' The French Code de Commerce, it may be noted, still keeps up the rule of *distantia loci* as it is called, which is embodied in Comyn's definition. It is still part of the French definition of a bill that it should be drawn in one place on another (Code de Commerce, s. 110). But in England the theory and rule of law concerning bills has altered. The banking or currency theory has succeeded to the mercantile theory. A bill now is a substitute for cash, and not merely a means of avoiding the transmission of it. Bills now are simply a flexible paper currency, and in accordance with modern decisions a bill is defined by sect. 3 of the Bills of Exchange Act, 1882, as 'an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a determinable future time, a sum certain in money, to or to the order of a specified person or to bearer.' Turning to sect. 32 of the Stamp Act, 1891, we find a much wider definition of

the term 'bill of exchange' for the purposes of that Act; and this is clearly a fact that a dictionary ought to call attention to. Many legal fallacies arise through the ambiguity of legal terms. An argument founded on one meaning of the term is applied to another meaning. Whether it is expedient for Parliament to appropriate a term with a defined legal or general meaning, and then to proceed to attach another meaning to it, may be an open question. But Parliament undoubtedly has the power to do so, and people require to be put upon their guard, when the power is exercised. It has been said that Parliament can do anything except change a man into a woman or a woman into a man. The Legislature certainly has sailed as near the wind as it can. For instance the Education Act, 1870, has so defined the term 'parent'[1] as to include a maiden aunt. I believe much scandal has from time to time been caused in remote districts by an aged spinster, of irreproachable character, having been summoned by the school attendance officer, as the parent of some truant urchin, who unfortunately was under her care. Clearly a law dictionary ought to take note of legislative definitions. The public should be informed of the pranks played by Parliament with the English language. No book that I know of has hitherto attempted this task. Judicial definitions have to some extent been collected in a very laborious work by Mr. Stroud —namely his Judicial Dictionary, but the scope of his work is strictly limited. It is merely a compilation of judicial dicta on the meaning of words and phrases, and references to such dicta. He does not criticise the definitions he cites, and he has paid much more attention to Equity than to any other branch of the law. There are many, and inconsistent, judicial attempts to define the term 'contract,' but I do not find any of them cited by him. Every lawyer knows that the term 'demurrage' is used in two senses (see per Bowen L.J. in *Clink* v. *Radford*, 1891, 1 Q. B. at p. 630), but he fails to point this out. Again, I fail to find any of the attempted definitions of 'marine insurance' or 'insurable interest,' or even 'stoppage *in transitu*.'

There is no need, I think, to dilate on the usefulness of a dictionary such as I have proposed. Sir William Anson in his suggestive article entitled 'Some Notes on Terminology in Contract' (LAW QUARTERLY REVIEW, vol. vii, p. 337), has forcibly demonstrated the confusion and ambiguity which characterise English legal terminology, and the practical evils which result therefrom. On this branch of the subject I cannot do better than refer to his article. A dictionary on the lines indicated would be

[1] By sect. 3 of the Act of 1870 the term 'parent' includes guardian, and every person who is liable to maintain, or has the actual custody of any child.

the first step towards improving our legal terminology, and reducing the existing confusion to something like order. It would tend to prune the wild growth of legislative definition, and would be an essential preliminary to that code of the future, which most of us, who have no longer a direct pecuniary interest in the promotion of unnecessary litigation, hope to live to see accomplished.

But assuming the need for a law dictionary, how is it to be compiled? The work would necessarily be expensive. It would require a paid editor who must be a competent lawyer, and he would require paid assistants, though doubtless many of us here to-night, and others as well, would be ready to help as volunteers. The book would necessarily be a large one, and though lawyers would use it freely, they would buy it but scantily. It would be much used in the libraries, but not often found in chambers. I am afraid law publishers would not see sufficient money in it to undertake its publication. But it is just the sort of work that the Clarendon Press or the Inns of Court might well take up on public grounds, and the present moment is a propitious one. The learned gentlemen who, under Sir Frederick Pollock, are preparing the Revised Reports, are going through exactly the course of reading which would be required for a law dictionary. Of course the Revised Reports do not cover the whole field which ought to be examined to make the work complete. But still they cover a large portion of the field, and it is a great pity that the work of the learned editors cannot be utilised for the double purpose.

I venture to ask the Law Club this evening whether, either collectively or individually, we cannot do something to bring the question before the Delegates of the Press or the Inns of Court in order that the present opportunity may not be allowed to slip by. I have added as an appendix to this paper a note on the meanings of the term contract, followed by a rough collection of definitions and illustrative citations. I am not putting forward this note as a specimen article in the proposed dictionary. I merely use it to indicate the materials from which such a dictionary might be compiled.

Appendix.

Contract.—The disposition of the best modern writers appears to be to define 'contract' as an agreement which is enforceable by law. It cannot, I think, be questioned that 'contract' is a species of which 'agreement' is the genus. But having regard to the ordinary language of English lawyers, cases, and statutes, the above definition seems too narrow, for it not only excludes the case of so-called unlawful contracts, but it also excludes the case of agreements

of imperfect obligation—as for instance a verbal agreement to sell goods above the value of £10, which is unenforceable till part performance, or an agreement which does not bear the proper stamp, or an agreement against which the Statute of Limitations may be pleaded. In ordinary legal language as used by careful and accurate writers, all these agreements would be described as contracts. They all have certain legal consequences. They are cognizable, though not enforceable, by law. But to define a 'contract' as an agreement intended to be enforceable, and, in fact, cognizable by law, though correct according to ordinary language, appears to be too vague for a scientific definition. Having regard to the existing use of the term, any precise definition must perhaps be more or less arbitrary. It is obvious that the so-called 'contracts of record' are not contracts within any legitimate meaning of the term. It is also obvious that the various quasi-contracts which in English law are known as 'implied contracts' have no connection with any real agreement. The law merely annexes to certain facts an obligation similar to that which it annexes to certain contracts. But all the various senses in which the term 'contract' is used ought to be discriminated and illustrated.

CITATIONS.

1. 'A *contract* is a speech betwixt parties that a thing which is not done be done.'—The Mirror, ch. ii. s. 27.

2. 'A *contract* is an agreement upon sufficient consideration to do or not to do a particular thing.'—Blackstone's Com., Bk. II., ch. 30, § 9, adopted by Kindersley V.C. in *Haynes* v. *Haynes* (1861), 1 Dr. and Sm., p. 433.

3. 'A *contract* or agreement is when a promise is made on one side, and assented to on the other, or when two or more persons enter into an agreement with each other by a promise on either side.'—Stephens' Com., Bk. II, ch. 5.

4. '*Contract* is a term of uncertain extension. Used loosely it is equivalent to "convention" or "agreement." Taken in the largest signification which can be given to it correctly, it denotes a convention or agreement which the courts of justice will enforce. That is to say it bears the meaning which was attached to it originally by the Roman jurisconsults.'—Austin's Jurisprudence, vol. 2, p. 1015.

5. 'Un *contrat* est une espèce de convention . . . une convention par laquelle les deux parties, réciproquement, ou seulement l'une des deux, promettent et s'engagent envers l'autre à lui donner quelque chose, ou à faire ou ne pas faire quelque chose.'—Pothier, Traité des Obligations, § 3, adopted in Addison on Contracts.

6. 'A "*contract*" is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.'—Anson on Contracts, Ed. 6, p. 9.

7. 'Every agreement and promise enforceable by law is a *contract*.'—Pollock on Contracts, Ed. 5, p. 2 [1].

8. 'An agreement enforceable by law is a *contract*.'—Indian Contract Act, s. 2 [1].

9. 'A *contract* is an agreement to do or not to do a certain thing. It is essential to the existence of a contract that there should be (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration.'—New York Draft Civil Code, §§ 744–745.

10. 'Le *contrat* est une convention par laquelle une ou plusieurs personnes s'obligent, envers une autre à donner, à faire, ou à ne pas faire quelque chose.'—French Civil Code, Art. 1101.

11. 'Le *contrat* est l'accord de deux ou plusieurs personnes pour former régler ou délier entre elles un lien juridique.'—Italian Civil Code, Art. 1098, translated by Huc.

12. 'Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representations being true, and who do act on it, equity will bind him by such representation treating it as a *contract*.'—Per Lord Cranworth in *Maunsell* v. *Hedges* (1854), 4 H. of L. Cas. 1039, at p. 1055.

13. 'When both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then, and not till then, an agreement or *contract* between the two is constituted.'—Per Kindersley V.C. in *Haynes* v. *Haynes* (1861), 1 Dr. and Sm. 426, c. i. p. 433.

14. 'A *contract* is constituted by the concurrence in intention of two parties, the one promising something to the other, who on his part accepts the promise; it is binding at the time when the two parties separate with that idea in the mind of each; the idea of the one being "I promise," and of the other "I accept." Thus in the Statute of Frauds (s. 17) which provides that "no contract . . . shall be allowed to be good," unless evidenced in a certain way, what has taken place by word of mouth is spoken of as a *contract*. The particular evidence or mode of expression required by the statute to make it enforceable at law is a different matter.'—Per Cleasby B. in *Morrison* v. *Universal Marine Insurance Company* (1872), L. R. 8 Ex. 40, at p. 60.

15. 'I understand by a *contract* an agreement which the law will enforce, and I apprehend that, speaking generally, the law will enforce all agreements made upon good consideration or with certain solemnities which dispense with consideration. Agreement and consideration are thus the elements which constitute a contract not under seal.'—Per Stephen J. in *Alderson* v. *Maddison* (1880), 5 Ex. Div. 293, at p. 297.

M. D. CHALMERS.

[1] [In both these cases 'agreement' and 'promise' are also separately defined.—ED.]

THE JUDGES' REPORT ON PRACTICE FROM A CHANCERY POINT OF VIEW.

THERE has never been a time when the law has not been abused for its delay and its costliness. Of late years the complaint against it has increased, all the more so because the belief prevailed that by the Judicature Acts the old evils had been swept away and a better state of things introduced. It is certainly strange that with a bench of judges superior to that of any other country in the world, with a bar to which are attracted the keenest intellects in the land, and with a body of solicitors generally respected for the integrity and conscientious ability with which they discharge their very responsible duties, the law which may be said to be the product of these three classes is so much abused, and it must be confessed deservedly abused. Moreover the abuse is beginning to take a very effective form. People are declining to go to law. It is stated that in spite of the increase of population the actual volume of business in the Courts of Justice is decreasing, and that to an extent which cannot be entirely attributed to bad trade.

In these circumstances the report and resolutions of the council of judges recently issued become of very special interest, not only from a political but so far as it affects barristers and solicitors from a pecuniary point of view. 'Interest reipublicae ut finis sit litium.' It is by no means to the interest of the legal profession that there should be an end to litigation. That is what is apparently coming to pass. As a matter of fact the interests of the public and of lawyers are identical. Whatever tends to make law dilatory and unduly expensive is to the disadvantage equally of the consumers and of the producers. Very keenly then has the report been read by every barrister and solicitor, and it is most desirable that it should be keenly discussed and criticised from every point of view before it becomes crystallised into rules or into an Act of Parliament. The object of these pages is to consider it entirely from the point of view of a Chancery junior under the present system, a position which the learned judges who have sprung from the Chancery ranks have either never occupied or have occupied only for a comparatively short time.

Before discussing the resolutions at which the Judges have arrived it is desirable to consider somewhat the system of practice

which they are intended to reform. This system is contained in 72 orders comprising over 1000 rules besides the appendices and miscellaneous provisions. Among the breakwaters of these more than one thousand rules every action has to be steered. The mere statement of such a fact is enough to discredit the system. Of course not all the rules apply to any one action, but this does not weaken the argument because it is necessary in every action to consider what rules are and what rules are not applicable, sometimes no easy matter.

There are no less than 62 rules relating to the issue and service of writs, without including the special rules relating to partners and firms substituted in June 1891 for the old rules which had proved unworkable for years. There are 28 rules for pleading generally, 9 for statement of claim, 21 for statement of defence and counterclaim, 9 for reply, and 13 additional rules for amendment, or 77 rules in all. These be it observed do not apply to a statement of facts or a special case for which other rules are provided. It might be supposed that pleadings hedged in as they are in this manner would be regarded as of some value. They might indeed be of great value in defining and narrowing the issues and reducing the number of witnesses at the trial, if the parties were uniformly held bound by their pleadings. But the practice has prevailed of late years of looking upon pleadings as mere ornamental discursions, something like the salute before the attack in fencing or the grasp of the hand before the blow in boxing, and parties are told that they knew where the real assault was going to be and ought not to be taken by surprise if it turns out to be very different from what might be gathered from the preliminaries. Thus it has come about that pleadings have lost the greater part of their value. Perhaps the fact that juniors in large practice have really no time to spend on pleadings may have something to do with this result, and perhaps judges who were once juniors in large practice may remember with sympathy how extremely inconvenient it would have been to themselves if they had been held bound to statements for which they scarcely knew that they were responsible until attention was called to them by the other side.

Many of the rules are altogether superfluous, such as r. 3 of Ord. III providing that in the writ 'the indorsement of claim shall be to the effect of such of the forms in App. A as shall be applicable to the case, or if none be found applicable, then such other similarly concise form as the nature of the case may require.' The caution which provides that if the writ is not in a prescribed form it shall be in a different form seems somewhat superabundant. An equal amount of caution better applied would have amended r. 1 of

Ord. II, providing that every action shall be commenced by a writ of summons. An action can now also be commenced by an originating summons. R. 1 of Ord. XIX, 'The following rules of pleading shall be used in the High Court of Justice,' might be omitted without making the slightest difference to the sense. R. 1 of Ord. XXXII, 'Any party to a cause or matter' (qu.? why not an action) 'may give notice by his pleading or otherwise in writing that he admits the truth of the whole or any part of the case of any other party,' is indisputably correct, but the necessity for embodying platitudes in the Rules of the Supreme Court is not quite obvious.

It may be said that after all no great harm is done by a number of unnecessary rules, and to a certain extent this is true. But the orders abound in superfluous regulations which are undoubtedly incumbrances and obscure the general scheme of practice which they are intended to elucidate. Some most useful if unpretending provisions have positively hidden themselves amid the foliage. Who would expect to come across a rule enabling one master to do the work of another during the illness of the latter in the order relating to the issue of writs? Or who would ever find, except accidentally and when he was looking for something else, a rule respecting the conduct of the sale of trust estates in the order treating of injunctions?

Perhaps it is scarcely fair to complain that there are four different rules for constituting representative parties, seeing that at any rate the rules are all to be found in the same Order (see rr. 8, 9, 32, 46, of Ord. XVI) though they might have been more conveniently placed consecutively. But these are not found to be enough, and further rules on this subject are threatened by the new resolutions.

Superfluity is not the only complaint to be brought against the rules. In the multitude of regulations there is confusion. If, where the writ has been indorsed for an account or involves an account, the proper accounts are to be ordered under r. 1 of Ord. XV unless the defendant satisfies the judge that there is a preliminary question to be tried, why under r. 2 of Ord. XXXIII may the judge at any stage of the proceedings direct any necessary accounts notwithstanding that there is some special issue to be tried? Either the rules are contradictory or the distinction is so infinitesimal as only to lead to confusion and to hamper instead of to assist the judge's discretion. Who can possibly know under which rule to proceed? The plaintiff asks for an account although there is a special issue to be tried, and he is in the right; the defendant resists an account on the ground that there is a preliminary question to be tried, and he is equally in the right.

A somewhat similar confusion arises when the plaintiff seeks to

obtain judgment against the defendant on admissions. If the defendant does not appear to the writ, the plaintiff can move for judgment and set down the action as a short cause. If the defendant appears but makes default in delivering a defence thereby in effect admitting the plaintiff's claim, the plaintiff may set down the action on motion for judgment under r. 11 of Ord. XXVII, and may move for judgment under Ord. XL. This involves setting down the action. If the defendant delivers a defence making actual admissions, the plaintiff under r. 6 of Ord. XXXII may apply to the judge for such judgment as he may be entitled to: in this case the action need not be set down, but if on the motion being made it appears that there must be a discussion or argument it may be ordered to go into the general paper, see the regulation of the Chancery Judges set out at p. 695 of the Annual Practice. Provided there is only one defendant or provided the defendants all adopt the same line of defence, the plaintiff has a chance of applying for judgment under the appropriate order. But if there are several defendants and they are inconsiderate enough to take different courses, the case may arise in which it is to say the least extremely doubtful whether it is possible to obtain judgment against them all in accordance with the rules. Suppose a person entitled to a moiety of real estate brings a partition action against two joint tenants of the other moiety and asks for a sale: both defendants appear to the writ, but only one delivers a statement of defence admitting the plaintiff's title: the defendants refuse to consent to a sale. In this case r. 12 of Ord. XXVII does not permit the action to be set down at once on motion for judgment against the defendant making default in his defence because the action is not severable, but directs it to be set down at the time when it is set down on motion for judgment against the other defendant. According to the regulation of the Chancery Judges referred to above the action is not to be set down against the other defendant. Let not any one venture to say that little difficulties of this sort may be left to the discretion or to the inherent jurisdiction of the judge. Who can say how much jurisdiction is inherent in a judge who is continuously time after time throughout the rules authorised on such and such an application being made to him to make such order as he shall think just? If the application is directed cannot the judge be permitted to make an order thereon without direct authority, or was it apprehended by the learned framers of the rules that the judge's natural inclination would be to make such order as should appear to him unjust?

Perhaps there is only one thing more remarkable than the precision with which the time for taking every step in the action is

fixed by the rules, and that is the regularity with which the provisions in this respect are disregarded. The statement of claim is to be delivered within six weeks, more than enough in nearly all cases; then the defendant has ten days in which to deliver his statement of defence, which is generally too little; three weeks more are allowed for reply, where a week would be ample. However these rules are mere waste paper; the pleadings are never completed in less than months. It is probably ex abundanti cautelâ that r. 7 of Ord. LXIV empowers the judge to enlarge the time appointed by the rules for taking any proceeding, especially as the rule fixing the time commonly adds 'unless the time shall be extended by the judge.'

A good deal might be said about r. 15 of Ord. LVIII, limiting the time for appealing from final and interlocutory orders, and the absolute impossibility of discovering from the rules what is a final and what an interlocutory order. Any attempt however to define the distinction might be beyond the province of the rules, for has not the legislature, with a prescience and a modesty but rarely found in combination, enacted that 'any doubt which may arise' (observe the caution of the expression) 'as to what orders are final and what are interlocutory shall be determined by the Court of Appeal' (Judicature Act 1875, sec. 12)? Some of the doubts which have arisen have been determined in 37 reported cases.

It is indeed no exaggeration to say that many of the rules are intelligible but are not meant to be observed, many are unintelligible but are applicable, many are contradictory and many are superfluous. What plaintiff in his senses, if he knew beforehand that this regiment of rules marshalled under 72 orders was awaiting the issue of his writ, would ever commence an action? The marvel is that so many people do go to law; few indeed are found to taste litigation, like the club sherry in Punch's picture, twice.

So much space has been devoted to criticism of the existing rules because the object of this article is to show that what is wanted is not more rules but fewer, not amplification but simplification of practice. What result then are the resolutions so far as they affect the Chancery Division likely to have? Of course, until the resolutions have been framed into rules or an Act of Parliament, criticism in detail would be for the most part out of place, the general purport of the new proposals is at present the point of interest. The first resolution affecting the Chancery Division, No. 39 in the list, requiring the appointment of another judge, is one upon which no question can possibly arise. For years the Chancery Judges have been unable to dispose of witness actions amid the multitude of their other duties, and another judge to try witness actions cannot

now be refused. Fortunately this resolution can be carried into effect at once. In fact until the new judge has commenced sitting the most important of the other changes cannot be attempted, while the appointment will at once relieve the strain. To what extent it will do so it is not easy to say in the absence of any information as to the number of witness actions tried by the different judges. The Report of the Council gives a list of the numbers of orders made by the Chancery Judges individually for the year 1891, but does not discriminate between those made in the trial of witness actions and those made in other matters. Each of the four judges with chambers devotes Mondays Fridays and Saturdays to special business of a non-witness kind. Tuesdays Wednesdays and Thursdays have to be divided between the trial of witness and the trial of non-witness actions. Assuming then that each of the four judges devotes on an average three days a fortnight to the trial of witness actions, it seems that the fifth judge by giving the whole of every week to this object tries as many witness actions as all the other four put together. Another judge therefore for the trial of witness actions alone ought practically to remove the burden from the shoulders of the four.

This will in some respects be a great improvement, but it sounds better than it is. It will allow the other judges to devote their whole time to non-witness business as is evidently contemplated by resolution 42, and it is certain that they will have sufficient business of this kind to occupy all their time. But so far as witness actions are concerned it seems that the only change will be that the half now tried by four judges will be tried by one judge with the same amount of time in which to try them as the four others now have collectively. Witness actions will be tried more conveniently by two judges by continuous sittings than by one judge by continuous and four judges by intermittent sittings, but they will not be tried any quicker. At present a witness action in the Chancery Division does not come on for trial for more than a year from the date of the issue of writ. What is the cause or what are the causes for this astounding dilatoriness?

The plaintiff is not responsible for it. So far as he is concerned his principal object is to get judgment. With the defendant it may be and often is different. But in an action where no delay is caused by interlocutory applications how much time is really wanted before the parties can be ready for trial? Eight days are reasonably allowed for appearance. If there are no pleadings the action might come on as soon as the witnesses can be got together, say at the expiration of another week. Usually there are pleadings: six weeks will suffice for these, and the parties will be ready for trial

within two months from the commencement of the action. That the action should then at once come on for trial would be the ideal state of things, for every day's delay now becomes to that extent a denial of justice. Now for the reality. After the appearance of the defendant the pleadings are delivered in a leisurely manner it may be extending over three months or more. After the close of the pleadings notice of trial may be given either with the reply or at any time after the issues of fact are ready, rr. 11 and 12 of Ord. XXXVI, and after notice the trial may be entered. In some mysterious manner the entry of the trial, which must be after notice, which must be after the close of the pleadings, may nevertheless take place although the pleadings are not closed, see r. 15 of the same order. Space does not permit the prosecution of the enquiry how this piece of jugglery is effected. Ten days notice of trial must be given under r. 14. Ten days! Ten months would be nearer the mark. Manifestly this gap must be filled somehow or other. The parties themselves thirsting for the fray are not satisfied with absolute inaction: something must be done if only to keep the pot boiling. Hence interrogatories, summonses for further and better answers, summonses for inspection of documents, applications to strike out pleadings, all of which generally do more harm than good. With interrogatories this is especially the case, they inform the defendant of the line which his cross-examination will take, they cause him as a matter of form to perjure himself on paper and then he feels bound for the sake of appearances to perjure himself in the box. It thus happens that the dilatoriness of proceedings and the multitude of provisions contained in the practice rules act and react on one another; the greater the delay the more need of interlocutory applications, the more interlocutory applications the more the time of the judge is wasted on unnecessary points and the greater the delay before the action can be put into the paper for trial. Insure that the action shall come on for trial within two months from the issue of the writ and all intermediate processes vanish as the mist in the presence of the sun. A large part of the judges' work, and that the most unsatisfactory part, would fall to the ground, or rather it would never arise, and the parties would find themselves in Court at the trial of the action with their resources undiminished in purse and person. Abolish delay and the costs may be left to take care of themselves: fail to abolish it and reform will be a mockery.

There is really no reason whatever in the nature of things why most actions should not come on for trial within two months. It is simply a question of an adequate staff of judges with a relentless stamping out of all unnecessary proceedings. A summons in an

action ought to be dismissed as a matter of course with costs unless it is clear that the relief asked by it is of such importance as to justify the expenditure of time and money involved: at present it is encouraged by the practice of making costs costs in the action. This question of delay is the more insisted on because it is apprehended that the proposed reforms will not make any material difference in this respect, at least in the trial of witness actions. Two judges will continuously try these as fast as they can, which as has been pointed out seems to mean as fast as the five judges now try them; so that the same interval will still remain between the entry for trial and the trial, to be filled up by interlocutory proceedings which of course will come before one of the four judges. And here it may be observed that it is not altogether satisfactory that one judge should be responsible for one half of an action and another judge for the other half, and that the latter should have to be informed of all orders made before the trial commences. Of course in theory judges cannot be expected to remember the orders they have made in any action, but as a matter of fact judges have much better memories than they are credited with. Moreover divided responsibility is always a bad thing. The system of transferring actions to another judge for the purpose of trial only is in fact a makeshift, and like all makeshifts is only better than absolute failure.

It remains to consider the effect of the new resolutions on the non-witness actions motions petitions and chamber work, that is to say on the work left to the four judges. There is little to be said on the subject of Court work, except that the more rapid dispatch of it will be an advantage. The new resolutions principally deal with the work done in chambers which is still further to be increased. This work the report mentions with great satisfaction. 'Originating summonses' it says in par. V, 'although very advantageous to the suitors increase the work of the judges in chambers. The further extension of this mode of proceeding is recommended.' Subsequently the 41st resolution shadows forth a scheme for the amalgamation of Registrars Taxing Masters and Chief Clerks, resulting apparently in the survival of the last named as the fittest.

The report gives no grounds for the satisfaction expressed with respect to the work done in chambers; it would be interesting to know what those grounds are. That the work is done expeditiously and cheaply may be admitted, that it is satisfactorily done can by no means be unreservedly granted.

It is of course impossible and it was never intended that a matter in chambers should be done with the care and elaboration

with which the same matter would be done in Court: bearing this in mind it is not too much to say in the first place that Ord. LV (see especially r. 2 subs. 1 and 2) throws into chambers a great many cases which can well afford to pay the slightly extra cost of being taken in Court, and which for safety sake ought to pay it. Again questions of construction affecting large sums of money and involving intricate points of law are too often decided in chambers on originating summons under r. 3. This is partly owing to a disinclination on the part of counsel when once they are before the judge to adjourn the matter into Court, thereby wasting the attendance in chambers. It is desirable and could easily be arranged that more summonses should be adjourned immediately into Court.

In the second place, unless counsel are before him, the judge is hardly ever properly instructed in chambers. Solicitors practically never attend summonses themselves for the sufficient reason that they cannot afford to be absent from their offices. The result is that two clerks, perhaps just out of their articles, are sent, in the silence of whose presence the judge has with the assistance of the Chief Clerk to ferret out for himself the facts of the case. A report arose probably from the uneasy consciences of solicitors that one of the new resolutions would require their personal attendance in chambers where counsel were not instructed. Counsel ought to be instructed in every case except the very simplest or poorest, for the purpose of ascertaining what order is really wanted and who are the proper parties, of informing the judge quickly and accurately of the exact point, and of seeing the order through correctly. No doubt this suggestion is open to the retort that it comes from an interested quarter, but it is sufficient to say in reply that the time saved to the judge would from a national point of view alone be well worth the slight extra cost to the individual, without taking into consideration that the orders would be much more correct than is often the case now.

In the third place the judge is called upon to make orders which might well be made by an official of much less cost and importance. Orders appointing new trustees, vesting orders, orders for administration and incidental orders for accounts and inquiries, orders for sale, orders in foreclosure actions, orders in fact which involve a good deal of time and of careful investigation before they can be properly made but which do not involve intricate points of law, might well be made by the judge's substitute. But here it is well to say openly that this substitute cannot be the Chief Clerk. The Chief Clerks as a body are known for the care and ability with which they perform the duties within their powers. In working

out the judge's orders, as in the administration of an estate or on the sale of real property, they are the most efficient persons who could possibly be found. But they cannot be relied upon, and their training as solicitors has not taught them, to decide who are the proper parties to be before the Court or what is the proper form for the order to take. Every barrister must in the course of his career have come across instances where the Chief Clerk, venturing perhaps with a noble ambition beyond the limits assigned to his post, has made orders which could only be looked upon as satisfactory until they were found out. To illustrate what is meant and to avoid the appearance of bringing even so slight a charge as this without evidence, one instance which came to the writer's knowledge shall be given. An order for sale was made by a Chief Clerk in a partition action, the property was sold, the purchaser made no objections, the money was paid into court, and the conveyance executed. The parties to the action then proposed to divide the purchase money, when it was discovered that no inquiry had ever been made nor any affidavit or evidence whatever furnished as to the persons entitled: moreover the parties believed themselves to be entitled under a will involving upon investigation a question of construction according to which it was clear upon the authorities that none of the parties before the Court were entitled to the property.

If the jurisdiction of the judge's substitute is to be enlarged, and the resolutions propose that he shall hear summonses for directions and decide questions of procedure and inspect documents where privilege is claimed (see resolutions 43 and 46), it will be absolutely necessary that he shall have had the training of a barrister as in the Queen's Bench Division. The proposed reforms, hinted at in resolution 41, may be intended to result in the appointment of a Master to draw up orders and decide questions of procedure and perhaps relieve the judge from questions of law where the amount involved is small, and the appointment of a Chief Clerk to carry out the administrative work and to tax costs. It is to be hoped that this will be the result, and that the time is not far distant when, all unnecessary proceedings being strictly prohibited, the judge may be able to devote his whole attention to those questions only which are worthy of it, and so may not only dispose of his non-witness business but also try his own witness actions within the two months which perhaps too despairingly have been spoken of above as the ideal period.

In conclusion a few criticisms may be ventured on points of detail in the resolutions. It is proposed (54) that the judge shall have power to make an order for administration subject to the

supervision of the Court, and the executor will accordingly be required to send in an account with observations (55–58). Surely this is a most ingenuous proposal for cooking your hare before catching him. Is it credible that an executor will be so innocent as to take upon himself the trouble of administration with the certainty that his every dealing with the estate will be allowed or disallowed in the discretion of somebody else? As he is not an officer of the Court and cannot be compelled to pass his accounts like a receiver or a liquidator, he will naturally decline, and throw the whole burden of administration onto the Court. Resolution 61, empowering the judge at any time to convert administration under supervision into administration by the Court, is not likely often to be called into operation.

Another resolution (61, 62) proposes to abolish the right of an executor to retain his own debt in preference to other creditors and to prefer one creditor to another. No sufficient grounds are stated for altering a law which is founded on common sense. It is most unfair to place a man in a position where his duty and his interest conflict, to provide him with the means of paying himself and deny him the right of doing so. Most people would think that when the estate is insolvent the least the executor deserves for his trouble is the privilege he has hitherto enjoyed. As to the other debts the right of the executor to prefer one creditor to another, as it is somewhat invidiously called, is really for the benefit of the creditors, as well as a proper protection to the executor. Who will dare to pay debts at all, if he thereby makes himself personally responsible in the event of the estate afterwards turning out to be insolvent?

Resolution 53 is not quite intelligible. It proposes that Ord. XVI, r. 8 shall be extended so as to apply to foreclosure actions against trustees. The rule requires no extension, it simply provides that trustees may sue or be sued as representing the estate, with power for the judge to require the beneficiaries to be made parties. One of the learned judges has held for reasons which appear to be absolutely conclusive that in foreclosure actions trustees do not sufficiently represent the persons interested in the equity of redemption, and that these latter must be served in order to be foreclosed (see *Francis* v. *Harrison*, 43 Ch. D. 183). No extension of the rule can alter the law as thus laid down or the reasons for it. It will require an Act of Parliament, which it is to be hoped will not be passed without consideration.

A great deal might be said on the proposal in resolutions 75–77 throwing the costs of orders and inquiries upon the particular fund instead of upon the residuary estate. The extent to which this is

to operate will apparently depend a good deal on the discretion of the judge, but if it is intended to alter the general rule, viz. that the residuary legatees are only to take what is left after the expenses of administration and that the particular legatees are to be paid in preference, it is doubtful whether the new practice will conform to the wishes of testators as nearly as the old.

It need scarcely be said that to treat fully such a subject as this would require more space than is comprised in a single number of this REVIEW. If these few pages appear to contain more of fault-finding than of approval, the justification is easy. It is unnecessary, and it would be presumptuous, to praise the judges' handiwork, to criticise it is both a pleasure and a duty.

H. M. HUMPHRY.

OF DOCK WARRANTS, WAREHOUSE-KEEPERS' CERTIFICATES, ETC.

OF late, certain firms of warehousemen have obtained private Acts of Parliament enabling them to 'issue transferable certificates and warrants for the delivery of goods,' and later in this paper will be found the material clauses of such an Act which are, I understand, common to all such enactments.

I may, however, begin by pointing out the true nature of warrants and other 'documents of title.'

If *A* lodge his goods with *W*, a warehouseman, they are *A*'s property, and constructively in *A*'s possession, because *W* holds them for him. *A* sells the goods to *B*. They are now *B*'s property, and *B* has the right to take possession. *W* must, after a reasonable time for inquiry, give up possession to *B* if *B* desires it. *B* brings a letter from *A* informing *W* of the sale; that letter would be an authority to *B* to receive possession. It may be that *B* prefers the goods to remain where they are for a time, and if *W* consents to hold them for him he is said to 'attorn' to *B*. The goods are now constructively in the possession of *B*. The property *passed by the sale*.

If *W* is a warehouseman, and keeps the goods of many people, he cannot trust to his memory to tell him who owns any particular parcel of goods. He will make an entry in his books, and will give a receipt to the depositor, indicating the goods by marks, numbers, or description[1]. But very probably the depositor may desire to sell the goods while lying in the warehouse. In order to facilitate dealings with the goods, and to enable himself to act with greater safety, *W* may give the receipt in a form which promises to give possession of the goods, not merely to the depositor, but to any one whom the depositor indicates in a way agreeable to the terms of the receipt[2].

[1] E.g. Reference number to be quoted on delivery order.
Not transferable.
28 Q. 9.
Messrs. A. & Co.
We hold at your disposal in our warehouse subject to conditions as per back hereof ex. S.S.
W. & Co.
[This being merely a receipt requires a delivery order.]

[2] E.g. Warrant for imported in the Capt. from
entered by on the deliverable to or assigns by endorsement hereon.
MARK. NUMBERS. WEIGHT.

The depositor then sells the goods to *B*, and transfers to him the document in the manner indicated in the terms of the receipt. As the document specifies certain goods, the sale is one of specific chattels. The property in these goods passes, and *B* has nothing to do but take possession. This he does by going to *W*, lodging the document with him, taking the goods if he wants them, or if he does not want them getting *W* to 'attorn' to him. When *W* does this, usually either by entry in his books, or by issuing to *B* a new document, the goods are in *B*'s possession. Thus the transfer of the document does not give possession: the importance of the document lies in this, that it is an authority to receive possession. Whether *B* does or does not get possession depends on himself.

It may be that the depositor merely desires to pledge the goods as security for an advance. The observations made upon the contract of sale apply equally here, with this addition, that as at Common Law a pledge depends upon the possession by the pledgee of the goods pledged, it is imperative upon him to take possession, in one of the ways described.

In the case of a sale it is important to take possession for the following reasons. So long as the goods are in the possession of *A*, or are not yet in the possession of *B*, *A* has the vendor's lien, or the right to stop *in transitu*; the goods are in the reputed ownership of *A* for the purposes of bankruptcy, and they are also liable to be sold over again by the vendor.

These documents, then, are concerned only with possession. Whether property has passed, or what property has passed, depends solely on the contract between *A* and *B*, with which *W* has nothing to do. To get possession *B* takes the document properly endorsed, if endorsement is required, to *W*, who thereupon delivers or attorns to him.

But while this procedure was necessary with these documents, a Bill of Lading was differently treated. *A* sells goods which are at sea to *B*, how is *B* to get possession of *his* goods? The captain who has given the receipt, called a Bill of Lading, is at sea, it is alike impossible to take possession of the goods, or to get the captain to attorn. In such a case it was considered that *B* had done all he could do if he got possession of the Bill of Lading properly endorsed. Under these circumstances, possession in fact of the Bill of Lading was held to give *B* possession in law of the goods. It was symbolical delivery. To be quite clear;—*A* puts goods on shipboard, sells them to, and endorses the Bill of Lading to *B*; the transfer of the Bill of Lading divests the vendor's lien, which rests on possession.

A has a peculiar right to stop in transit if he hears of *B*'s insol-

vency, and retake possession from *B*, thus reviving the unpaid vendor's lien. But that right of *A* can be defeated by *B* endorsing the Bill of Lading to *C*, who is acting *bona fide* and gives value. The goods by this endorsement to *C*, leave *B*'s possession and are in *C*'s possession.

Simple as this seems, it was not till 1884, when the case of *Sewell* v. *Burdick* (L. R. 10 Ap. Cas. 74) went to the House of Lords, that it was held that the transfer of a Bill of Lading did not pass the *property* in the goods, and it was Lord Bramwell who pointed out that the property passed by the contract in pursuance of which the Bill of Lading was transferred.

The possession thus of a Bill of Lading was possession of the goods, while possession of other documents of title was not. The vendor's lien, for instance, was not discharged by *A* transferring a dock warrant to *B*, nor by *B* transferring it on to *C*.

Representations were repeatedly made by special juries that in the ordinary practice of merchants transfers of these other documents was understood to pass possession so as to destroy the vendor's lien, and defeat the right of stoppage *in transitu*. Parliament intervened, and passed the Acts known as the Factors Acts.

In the last Act the words 'documents of title' are defined, and include those documents to which I have referred. Section 10 of the Act alters the law. Under it if *A* sells goods to *B*, and lawfully transfers the document of title to *B* in a manner agreeable to the terms of the document, possession still remains in *A* till *W* attorns: but if *B* transfers the document to *C*, who takes it in good faith and for valuable consideration, this last transfer of *B* to *C* defeats the vendor's lien and also the right to stop in transit. The possession of *W* is the possession of *C*. The operation of the second transfer has the same effect as the negotiation of a Bill of Lading has in defeating stoppage *in transitu*.

As the vendor's lien and stoppage *in transitu* are merely rights of the vendor, the statute only gives protection against *A*'s claims. If *A* went bankrupt before *C* got *W* to attorn to him, the goods would probably be in the reputed ownership of *A*.

I now come to those special private Acts mentioned at the beginning of this article. The important clauses are as follows:—

'The said firm may if they think fit from time to time at the request of any person warehousing or depositing goods in or upon any warehouse, wharf, or premises of the said firm, or entitled to any goods so warehoused or deposited, issue and deliver to him a Certificate of such goods having been so warehoused or deposited, or a Warrant for the delivery of such goods or any part thereof to be specified in such warrant.'

'Every such certificate or warrant shall be deemed to be a document of title to the goods specified therein, and shall be transferable by endorsement or special endorsement, and any holder of such certificate or warrant, whether the person named therein or the endorsee thereof, shall have the same right to the possession and property of such goods *as if they were deposited in his own warehouse.*'

The practice was for the original depositor *A* to endorse the warrant in blank, or for *W* to issue the warrants 'to order,' and for themselves to endorse in blank and hand them over to the depositor. And it was usual to accept these warrants as passing a good title to the holder from hand to hand. Banks took them as security on the assumption that the holder of a warrant endorsed in blank was an 'endorsee thereof.' This assumption was erroneous. If *A* endorses a warrant and hands it to *B*, *B* is endorsee. If *A* endorses it to *B*, *B* is a special endorsee. *B* hands the warrant to *C* without endorsement, *C* is not an endorsee.

While under the Factors Act two transfers of the document were needed to defeat *A*'s rights, here one transfer puts the goods into the possession of *B*, without any necessity for *B* to go to *W* and get his attornment, and so on if *B* endorsed to *C* and *C* to *D*. In case however of an endorsement in blank reaching *D* who had bought from *C*, *D* would have to get *W* to attorn to him.

There was also a notion, inspired by the belief that these warrants had been made 'negotiable instruments,' that a holder for value of one of them had a good, an indefeasible title to the property in the goods. This also was erroneous. He could have no better title than his transferor. *Nemo dat quod non habet.*

And this is so in the case of a Bill of Lading: the endorsee of a Bill of Lading who has paid honestly for the goods, has no title to the goods if his vendor was not the owner.

A. T. Carter.

A DOUBTFUL POINT IN COMMERCIAL LAW.

THIS article deals with the liability of a merchant, where he is not in default, to pay damages to a shipowner for the detention of a ship at the port of discharge by causes over which the merchant has no control. In the last few months in three cases the decisions on this point by Mathew J., Charles J., and Wright J., at Nisi Prius, without a jury, have been reversed by the Court of Appeal. These cases presented no unusual features, the contracts were in common and recognised forms, the causes of delay (strikes and over-crowded berths and warehouses) are of constant occurrence, and it is strange that all three cases were not concluded by authority so that there should be no room for difference of judicial opinion as to the rule of law applicable to the facts. It is a peculiar coincidence that in each of the three cases the learned judge was persuaded to give judgment for the plaintiff shipowners, and in each case wrongly, according to the Court of Appeal.

In charter parties and bills of lading the duty of the merchant to unload the ship at the port of discharge is dealt with in three ways: (1) a certain number of days are allotted, 'The ship to be discharged at such wharf or dock in fourteen like working days[1];' 'Thirteen running days, Sundays excepted, to be allowed the freighters for sending the cargo alongside and unloading, but in no case should more than seven days be allowed for unloading[2];' 'The cargo to be unloaded at the average rate of not less than 100 tons per working day[3],' &c. (2) The contract is entirely silent as to the time allowed for unloading[4]. (3) The contract contains some reference to the custom or practice of the port of discharge: 'The said freighter should be allowed the usual and customary time to unload the said ship at her port of discharge[5];' 'The cargo to be discharged with all despatch according to the custom of the port[6];' 'To be discharged at usual fruit berth as fast as steamer can deliver as customary[7];' 'To be discharged with all despatch as customary[8],' &c. It will be well to consider each of these

[1] *Thiis* v. *Byers*, 1876, 1 Q. B. D. 245.
[2] *Budgett* v. *Binnington*, 1890, 25 Q. B. D. 320; '91, 1 Q. B. 32.
[3] *Clink* v. *Radford*, '92, 1 Q. B. 625. [4] *Hick* v. *Rodocanachi*, '92, 2 Q. B. 626.
[5] *Rodgers* v. *Forrester*, 1810, 2 Camp. 483.
[6] *Postlethwaite* v. *Freeland*, 1880, 5 Ap. Ca. 599.
[7] *Good* v. *Isaacs*, '92, 8 T. L. R. 476.
[8] *Castlegate S. S. Company* v. *Dempsey*, 1892, 1 Q. B. 54 and 8 T. L. R. 523.

classes separately, though the latest decision in the Court of Appeal went on the ground that for the purpose of ascertaining the liability of the merchant for the detention of the ship at the port of discharge, class (2) could not be distinguished from class (3).

(1) Where the parties have in the contract specified a certain number of days for the unloading of the cargo there is little difficulty.

The detention of the ship was caused by the crowded state of the London Docks in *Randall* v. *Lynch*[1], by rough weather on the Tees at Middlesborough in *Thiis* v. *Byers*[2], by the delay of other consignees in removing cargo placed above the grain of the defendant in *Porteus* v. *Watney*[3], by the strike of the Bristol Dock labourers, in November, 1889, in *Budgett* v. *Binnington*[4]. In these cases the merchant was held liable to compensate the shipowner for the detention of the ship beyond the specified number of days though he was not in default, and could not have prevented the delay. 'Where the time is thus expressly limited and ascertained by the terms of the contract the merchant will be liable to an action for damages, if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, *for he has engaged that it shall be done*[5].' The contract, when it is in this form, is that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, the charterer or the holder of the bill of lading will pay a certain sum for each day beyond those days, however the delay may be caused unless it is by default of the shipowner. In *Budgett* v. *Binnington*[4] the cargo of grain was being discharged at Bristol according to the custom of the port by the joint action of the shipowners and the consignees, who employed separate stevedores, who in their turn engaged the labourers. After the unloading had proceeded for three days, the labourers employed by both firms of stevedores struck work, and for four days no cargo was discharged. The jury found that in consequence the shipowners were not able and were not ready and willing to perform their part of the discharge. Notwithstanding this finding the Queen's Bench Division gave judgment for the shipowners, and this was affirmed by the Court of Appeal. It was decided that there is no implied condition, precedent to the liability of the merchant, that the shipowner should be able and willing to perform his part of the contract, and that the only defence open to

[1] 1809, 2 Camp. 352. [2] 1876, 1 Q. B. D. 245. [3] 1878, 3 Q. B. D. 535.
[4] 1892, 25 Q. B. D. 320; '91, 1 Q. B. 35.
[5] Abbott on Shipping, 5th edition, p. 181, the last edition published in the lifetime of Lord Tenterden. The last words are put in italics by Lord Tenterden.

the merchant is that there were no available means of performing the contract owing to the default of the shipowners. 'The only condition attached is that the lay days shall have commenced and run out. Directly the shipowner shows this state of facts he has proved his case, and it lies on the other side to show, not that there has been no breach of contract, but that he is excused from the performance. In other words, his case is one of confession and avoidance, and the whole burden of proof is upon him[1].' 'The strike was an unforeseen occurrence, and nobody's fault, and one of those risks which the merchant contracted to bear. I can therefore find no fault in the shipowner or those for whom he is responsible to excuse the breach of contract by the merchants[2].'

(2) If the contract is silent as to the time allowed to the merchant for unloading the cargo at the port of discharge, the question is, What is the liability which the law imposes by implication?

In *Ford* v. *Cotesworth*[3] the agreement in the charter party was that the 'said vessel should deliver the said cargo in the usual and customary manner agreeable to bills of lading and so end the voyage,' but there was no stipulation as to time. The delay was caused by the refusal of the authorities at Callao, the port of Lima, to allow the cargo to be landed at the Custom House between April 11 and May 12, 1866, in consequence of the apprehended bombardment of the port by the Spanish fleet. At that time there was war between Spain and Chili, and Peru was involved in the hostilities. Under the direction of Cockburn C.J., the jury found that there had been no unreasonable delay 'either looking to the ordinary state of things at the port or looking to the existing, that is the extraordinary circumstances,' and the defendants, the charterers, had the verdict which they retained in the Court of Queen's Bench and in the Exchequer Chamber. 'We think,' said Blackburn J., 'that the contract which the law implies is only that the merchant and shipowner should each use reasonable despatch in performing his part. If this be so, the delay having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls[4].' It should be noticed that this decision did not proceed upon the ground that both parties were equally in default, and that neither could complain of the other, but upon the ground that neither party was in default, that is, that the shipowners had no cause of action against the charterers[5].

In *Wright* v. *The New Zealand Shipping Company Limited*[6], the deten-

[1] Per Lord Esher M.R., 1891, 1 Q. B. 38. [2] Per Lopes L.J., '91, 1 Q. B. 41.
[3] 1868, L. R. 4 Q. B. 127, and 1870, L. R. 5 Q. B. 544.
[4] 1868, L. R. 4 Q. B. at p. 137.
[5] See *Cunningham* v. *Dunn*, 1878, 3 C. P. D. 443. [6] 1879, 4 Ex. D. 165 n.

tion of the ship at Port Lyttleton, New Zealand, was caused by the delay of the firm of lightermen employed by the charterers to send lighters alongside the ship. At the time there was a 'rush' of vessels at the port: about twenty were lying there, one half of which either belonged to or were chartered by the defendants, and it was proved at the trial that after the arrival of the vessel, in respect of which the action was brought, the agents of the defendants gave preference as to discharging cargoes to vessels with 'round' charters, that is to vessels chartered for the voyage from a British port and back again. The charter party contained no reference to the time or to the manner of unloading the cargo at Port Lyttleton. At the trial Pollock B. told the jury that they were to take into account the fact that the port was full of vessels, and the charterers had the verdict. The Exchequer Division and the Court of Appeal ordered a new trial on the ground of misdirection, and the charterers paid into court a sum of money which the shipowners accepted in satisfaction of their claim. This decision can be supported only on the ground that the facts showed that the charterers were responsible for the delay, and had brought their difficulties on themselves, and that the case is an illustration of the principle laid down by Lord Ellenborough in *Hill* v. *Idle*[1], where the merchant was unable to unload in the usual time because he had shipped a cargo of French wines from Oporto, and he was not allowed to unload them without an order from the Treasury, and a month elapsed before the order was obtained. But the judgments of the Court of Appeal in *Wright* v. *The New Zealand Shipping Company*[2], and the reasons there given are at variance with the judgments of Lord Selborne and Lord Blackburn in *Postlethwaite* v. *Freeland*[3].

In *Hick* v. *Rodocanachi*[4] the unloading was delayed by the London Dock strike of 1889. The charterers were protected by the cesser clause in the charter party, and the defendants were consignees of the cargo under a form of bill of lading which contained no reference to the charter party, and no limit of time within which the cargo was to be discharged. At the trial without a jury Mathew J. gave judgment for the shipowners, on the ground that by implication the consignees had undertaken to unload within a reasonable time and had failed to discharge that obligation. The Court of Appeal reversed this decision. In *Wright* v. *The New Zealand Shipping Company*[2] the judges had implied a contract to unload in a reasonable time judged by ordinary circumstances, and the cases show the existence of two distinct and opposing views, (1) that the time is to be measured by something which may be ascertained more or less

[1] 1815, 4 Camp. 327. [2] 1879, 4 Ex. D. 165 n.
[3] 1880, 5 Ap. Ca. 599. See pp. 609, 616, and 617. [4] '91, 2 Q. B. 627.

exactly when the contract is entered into, reasonable time under ordinary circumstances; (2) that the time is to be measured by the actual emergent events, and by the diligence or negligence of the parties concerned under those events, by a measure which cannot be forecast at the time of the contract, but can only be ascertained by the event. Fry L.J. declared that there was a very even balance of authority in favour of each view, and this made the case difficult to decide, but a consideration of two railway cases (*Biddon* v. *G.N.R. Co.*[1], where a snow storm delayed a cattle train, and *Taylor* v. *G.N.R. Co.*[2], where the delay was owing to the breakdown of a train belonging to another company which had running powers over the defendant's line), in which it had been held that in the absence of any stipulation the obligation of a common carrier must be measured by his diligence or negligence in all the circumstances of the case, tended in favour of the view that reasonable time means reasonable time under all the circumstances of the case.

The decision of the Court of Appeal proceeded on the maxim, 'Lex non cogit ad impossibilia.' 'We have,' said Lindley L.J., 'to do with implied obligations: I am aware of no case in which an obligation to pay damages is ever cast by implication upon a person for not doing that which is rendered impossible by causes beyond his control[3].'

(3) The third class of cases presents the greatest difficulties, but it is to be hoped that two very recent decisions of the Court of Appeal have cleared the air. The clause containing the reference to the usage or custom of the port as to the discharge of a cargo takes various forms, and strictly a decision as to the meaning of one form is not conclusive authority as to the meaning of another form. An examination of some cases will show how far it is possible to deduce a general rule.

In *Rodgers* v. *Forrester*[4] the shipowner agreed that 'the freighter should be allowed the usual and customary time to unload the said ship or vessel at her port of discharge.' Owing to the crowded state of the London Docks the ship could not get a berth and deliver her cargo of wines from August 26th to October 20th, 1809. Lord Ellenborough said, 'What is the usual and customary time for a ship to unload a cargo of wines in the port of London? According to the evidence, when the ship gets a berth by rotation, and the wines can be discharged into the bonded warehouse;' and the defendants had the verdict.

In *Postlethwaite* v. *Freeland*[5] the ship *Cumberland Lassie* was

[1] 1859, 28 L. J. Ex. 57. [2] 1866, L. R. 1 C. P. 385. [3] '91, 2 Q. B. p. 638.
[4] 1810, 2 Camp. 483.
[5] 1879, 4 Ex. D. 155, and 1880, 5 Ap. Ca. 599.

chartered to carry steel rails from Barrow-in-Furness to East London in South Africa, a port situate on a river with a bar at the mouth, there 'to be discharged with all despatch according to the custom of the port.' Ships of the tonnage of the *Cumberland Lassie* are unable to cross the bar until a part of their cargo has been discharged into lighters which are warped over the bar to and from the vessel by an ingenious contrivance described in the judgments in the case. When the *Cumberland Lassie* arrived at East London on August 31, 1875, there were already in the roadstead seven vessels with similar cargoes of steel rails which had the preference in being supplied with lighters. The East London Landing and Shipping Company controlled the warp and owned nine or ten lighters for work in conjunction with the warp; of these only four were suitable to receive the discharge of steel rails, and in consequence a delay of twenty-four days occurred before the unloading of the vessel commenced. The evidence established that the time occupied in discharging the vessel was not greater than the average time occupied in discharging vessels of the like tonnage in the autumn of 1875. At the trial, Lord Coleridge C.J. asked the jury whether in the year 1875, at the port of East London there was any settled practice or custom as to the unloading of sailing vessels laden as the *Cumberland Lassie* was laden. And if so, whether the vessel was unloaded with all despatch according to that custom. The jury answered both questions in the affirmative, and the charterers had the verdict and a new trial was refused by the Exchequer Division, by the majority of the Court of Appeal, and by the House of Lords. In the Court of Appeal, Cotton L.J. adhered to the opinion expressed by him in *Wright* v. *The New Zealand Shipping Company*[1], and dissented on the ground that the insufficient number of lighters could not be considered to be a matter regulated by or dependant on the custom or practice of the port, and that in the absence of any express stipulation it was the duty of the charterers to provide appliances of the kind ordinarily in use at the port for the purpose of taking delivery of the cargo. On the other hand, Brett and Thesiger L.JJ. were of opinion that the use of the warp and lighters formed part of the 'custom of the port,' that the charterers did all that they were bound to do, and that they were excused by the custom of the port from doing that which the plaintiffs complained of as an omission. The House of Lords affirmed that decision. 'If an obligation,' said Lord Selborne L.C., 'indefinite as to time is qualified or partially defined by express or implied reference to the custom or the practice of a particular port, every impediment arising from or out of that custom or practice which

[1] 1879, 4 Ex. D. p. 169.

the charterer could not have overcome by the use of any reasonable diligence ought (I think) to be taken into consideration [1].'

In *Good* v. *Isaacs* [2] the charter party provided that the steamship *Artemis* should load a cargo of oranges in Spain and proceed to Hamburg 'to be discharged at usual fruit berth as fast as steamer can deliver as customary, and when ordered by the charterers.' It is the practice at the port of Hamburg to discharge fruit by means of cranes into a fruit warehouse. The warehouse and the cranes are under the control of government officials, without whose sanction the appliances cannot be used for the discharge of a cargo. The *Artemis* was, with the consent of the officials, moored at a usual fruit berth opposite the fruit warehouse on March 8, 1889, but by reason of the warehouse being full, the discharge did not commence until March 11. It was completed on March 12. Charles J. held that the shipowners were entitled to demurrage, but the Court of Appeal reversed his decision on the ground that the cranes could only be used to unload the oranges according to the custom and regulations of the port when, and if, there was room in the warehouse, to receive the fruit as it was discharged. Lord Herschell founded his judgment on the Scotch case *Wyllie* v. *Harrison* [3], where the charter party provided that the cargo was to be discharged 'as fast as the steamer can deliver after having been berthed as customary.' In that case the rule of the port of discharge was that pig iron should not be laid on the quay, but should be discharged into trucks provided by the railway companies. On the arrival of the vessel due notice was given to the railway company by whose lines the cargo was to be forwarded, and the delay was occasioned by the failure of the company to provide the necessary trucks. The Lord President and the other judges of the Court of Session held that the consignees of the pig iron were not liable for demurrage.

The last case is the *Castlegate S. S. Company* v. *Dempsey* [4]. The *Castlegate* arrived in Garston Dock on November 10, 1890, and commenced unloading on November 14. On November 15, the labourers refused to unload a ship called the *Jessie*, from Barrow, which had been 'blocked' by their Trades Union. The Dock Company locked out the men and brought in strangers; owing to the lock out and the incompetence of the strangers, the unloading of the *Castlegate* was not completed until December 3. The charterers had contracted to discharge the vessel 'with all despatch as customary.' Wright J. found as a fact, that the cargo should,

[1] 5 Ap. Ca. p. 608.
[2] 13 Court of Session Cases, 4th series, p. 92.
[3] 1892, 8 T. L. R. 476.
[4] '92, 1 Q. B. 54, and on appeal 8 T. L. R. 523.

in the absence of a strike, have been discharged in ten days, and he held that the charterers were liable for demurrage. He declined to apply the rule adopted by the Court of Appeal in *Hick* v. *Rodocanachi*[1]. He said, 'The result of doing so would, in effect, be to give to a charter party which specifies that the unloading is to be "with all despatch as customary," the same meaning as if it contained no such words,' and he distinguished *Postlethwaite* v. *Freeland*[2] on the ground that there the impediments arose from or out of the custom and position of the port itself, and were not extraneous, such as a strike which in no way arises from or out of the custom of the port. The Court of Appeal reversed this decision. The headnote of the decision is, 'Held that the words "with all despatch as customary" fixed no time for unloading, and that therefore the discharge must be carried out within a reasonable time in the actual circumstances existing at the port.' Mr. Kennedy, Q.C. who argued for the appellants, is reported to have contended that where there was a fixed time for unloading, the charterers took the risk of delay, but not where no fixed time was named for unloading: that there were only these two classes: and that the words 'to be discharged with all despatch as customary' did not refer to time but meant with all despatch, using the customary means of despatch available at the port under the actual circumstances. The Master of the Rolls could not distinguish the case from *Postlethwaite* v. *Freeland*[2], and quoted a passage from his own judgment in that case:—'To me this clause "with all despatch according to the custom of the port" seems to mean that the ship was to be discharged with all such despatch as was consistent with the manner and process wherewith every vessel going to that port is discharged[3].' That is he accepted the argument of the appellants that the clause regulated the manner and not the time of the discharge, and that, there being no other provision applicable to the time of discharge, the rule in *Hick* v. *Rodocanachi*[1] governed the case.

Mr. Carver in his book on The Law of Carriage by Sea[4], writes: 'When the time is to be with "usual despatch of the port" or "in the usual and customary time," this is in effect giving a fixed time for the work, namely such a time as would under ordinary conditions be usually occupied at that port,' and he doubts the decision in *Rodgers* v. *Forrester*[5] on the ground that it makes the phrase 'in the usual and customary time' equivalent to 'in the usual and customary manner.' This passage is in agreement with the judgment of Wright J.[6], but opposed to that of the Court of Appeal in *Castlegate S. S.*

[1] '91, 2 Q. B. 626.
[2] 1880, 5 Ap. Ca. 599.
[3] 1879, 4 Ex. D. p. 164.
[4] 1st edition, § 611.
[5] 1810, 2 Camp. 483.
[6] '92, 1 Q. B. 54.

Company v. *Dempsey*[1], for the latter has decided that the word customary refers to the mode and not to the time of unloading. In *Postlethwaite* v. *Freeland* in the House of Lords, Lord Blackburn said: 'I do not think that this (the clause as to discharging "with all despatch as customary") alters the question, as the express reference to the custom of the port of discharge is no more than what would be implied. For I take it that a charter party in which there are stipulations as to loading or discharging a cargo in a port is always to be construed as made with reference to the custom of the port of loading or discharge as the case may be[2].' The judgment of Mansfield C.J. in *Burmester* v. *Hodgson* is precisely to the same effect[3].

If this be so, the result of the cases is that the merchant either engages by the contract to unload in a certain number of days, or he does not so engage; either he promises absolutely to discharge the vessel in a certain number of days after the voyage has ended, or he promises to use reasonable diligence, under the actual circumstances existing at the time of the discharge. In the absence of express stipulation, in the first case he is, and in the second case he is not, liable to pay damages where he is not in default, for the detention of the ship by causes over which he has no control. In the first case the loss resulting from the detention of the ship by strikes, bad weather, crowded docks, &c., falls on the merchants, in the second case on the shipowners. It would be well if the House of Lords, which has not spoken on this subject since 1880, could speak again with authority, for in commercial law it is of more importance to attain to certainty than to abstract justice. But for the present shipowners may be advised to press for the insertion of definite laydays in charter parties and bills of ladings, and merchants should strive to have the time for discharge left vague and uncertain.

ERNEST C. C. FIRTH.

[1] 8 T. L. R. 523. [2] 1880, 5 Ap. Ca. p. 613. [3] 1810, 2 Camp. 489.

MARRIAGE LAW IN MALABAR.

AN interesting attempt is now being made to put on a better footing the family law of the people who follow what is called the Marumakkathayam rule. The chief representatives of the classes subject to this rule are the Nairs, and, as they stand in the social and intellectual scale high among the peoples of Southern India, it is no matter for surprise that, in the place of rules indicating a backward state of civilization, they should seek to establish a system more in accordance with modern ideas. According to ancient custom regulating the lives of about seven hundred thousand persons in Malabar the family is based on the matriarchal system; the line of descent is traced from the common female ancestress, and it is not a man's own children but his sister's sons that may be said to be his heirs. The family or tarwad in a simple form consists of a mother, her brothers and her children, living together in one house. The property of the family, other than that acquired by any individual member by his own exertions, belongs to them jointly, and except by common consent is indivisible. Each member is entitled to be maintained out of the profits of it, but he cannot otherwise deal with any part of it as his own. The management and control of it is vested in the eldest male, who is called the karnavan. Property acquired by an individual is his own to deal with it as he pleases during his life-time, but he cannot dispose of it by will, for on his death it becomes merged in the family property. This state of things makes it probable that the institution of marriage was unknown, and other circumstances in Malabar point in the same direction. In the opinion of the High Court, expressed more than twenty-five years ago and since acted on, the union of the sexes is simply a state of concubinage into which the woman enters of her own choice, being at liberty to change her consort when and as often as she pleases. There is no reason to suppose that the Court will alter this opinion or dignify as a marriage a connection which either party may terminate for any reason or no reason. Nevertheless in point of fact it would be a gross libel on the Nairs to say that public opinion sanctions a system of promiscuous intercourse. Polyandry, if in strictness it can be said ever to have existed among a people ignorant of marriage, has disappeared, and it is said that the free

right of divorce is scarcely ever exercised. As a rule the union lasts for life, and an experienced official is able to say, 'Conjugal fidelity is very general. Nowhere is the marriage tie, albeit informal, more jealously guarded or its neglect more savagely avenged.'

Instead of the husband and wife living apart each in his or her tarwad house, it is becoming common for them to live together in the former's house. Parental affection, for which the law makes no allowance, is exhibiting itself in gifts made by the father to his children. The process of evolution has arrived at such a point that many of the people would be content to leave things as they are, provided only they could acquire by legislation the power of bequeathing by will their separate property. Others, however, are desirous of removing the reproach which is involved in the absence of a marriage law, and of endowing husband and wife with the rights and duties which generally attach to the married state. At present they are of course excluded from the operation of the chapter of law which makes penal such acts as the enticing away a married woman, adultery, and bigamy; and there is a natural anxiety to give a legal sanction to unions which are now of a conventional and precarious nature only. As far as the people are concerned no difficulty would arise, for cohabitation with one woman has come to be the rule and polygamy is of rare occurrence. But before the law can sanction and protect marriage, the conditions of a valid marriage must obviously be determined; some form must be prescribed for adoption by those who wish to put their marriage on a legal footing; and some provision must be made for divorce, since it cannot be supposed that Nairs should adopt the Hindu system in which divorce is unknown. And, further, the question arises how the institution of marriage is to be made to square with the Malabar rules of inheritance. On these points there is great room for diversity of opinion, and the Commissioners to whom the whole matter has recently been referred do not agree in their recommendations.

With regard to the conditions of a legal marriage the proposal which commends itself to the party of reform is to prescribe registration as the only necessary formality, and, while disregarding all caste restrictions, merely to require that the parties should not be related to one another within the fifth degree. This is a bold proposition which, if carried into effect, would be likely to operate far beyond the limits of Malabar. Although religious considerations may have little to do with the conventional marriages of the Nairs, those connections are subject to many caste restrictions. Of these the chief is that a Nair man or woman is forbidden to marry out of the Nair caste; a Nair woman is not even at liberty to take

a husband from an inferior division of the caste. Another curious rule is that which discountenances a woman of North Malabar marrying a man of South Malabar.

These and similar caste restrictions the advocates of the proposal above mentioned would have ignored. Breach of caste rules, they contend, should not be taken to invalidate a marriage evidenced in due form by registration. What the caste would condemn as incestuous intercourse should nevertheless be recognized in law as a valid marriage. It does not require much knowledge of India to understand the opposition which such a proposal as this will excite. Hindus all over India will be quick to see that such a marriage law enacted for Malabar, displacing the caste tribunal and regulating the institution by a few simple statutory rules, would form a dangerously attractive precedent. It is not only in Malabar that sections of society exist among whom a law legalising marriages made in defiance of caste rules would be popular. On the other hand it seems clearly inexpedient to constitute as a statutory condition of a valid marriage the observance of all the rules hitherto associated with the unions which in Malabar have done duty for marriage. Some of these rules which are foolish and vexatious might in course of time, as education progresses, be expected to disappear, and it is most undesirable that the Legislature should do anything calculated to give them vitality. Social opinion will for some time to come suffice to secure a general obedience to them, and there is no reason why the Legislature should throw its weight into the scale and help to stereotype restrictive rules which, having lost any meaning they may ever have had, would but for outside interference ultimately fall into desuetude.

The next question to be considered is that of divorce. Among orthodox Hindus marriage is a sacrament and divorce is an unknown expedient. It is absurd to suppose that the Nairs and those among whom their customs prevail would willingly adopt such a principle, and subject themselves to a law making marriage indissoluble. Some regulated mode of dissolving the tie must be prescribed. Several schemes have been propounded. On the one hand the President of the Commission, the distinguished Brahmin Judge of the Madras High Court, suggests two alternative plans. Reviewing the evidence taken before him he finds a great diversity of opinion as to the causes considered in Marumakkathayam society sufficient to justify divorce, and comes to the conclusion that there is no such general and uniform practice, either as to the causes or as to the form of divorce, as to furnish the elements of a customary law. This being the case, the alternative which presents itself to

his mind is either to declare as just grounds of divorce the causes specified in the Divorce and other cognate Acts, or, leaving matters as they are to the influence of social opinion, merely to impose certain conditions with a view to secure deliberation and prevent hasty action. With this view he would require the party seeking divorce to apply with his karnavan's consent to the Court to serve notice of his intention on the other party, and would also provide that the divorce should not take final effect for a year after the notice. If there is to be a specification of the grounds on which a divorce may take place, he proposes by way of check on the arbitrary exercise of the right of repudiation to exact from the party, seeking a divorce without just cause, a penalty amounting to one fourth of his or her separate property, this quarter share to be held for the benefit of the children, the income only being enjoyed by the innocent parent during his or her life. This scheme of compensation might doubtless serve to discourage unreasonable repudiation among persons possessed of property, but obviously it would not affect the larger class of persons who have not acquired any property of their own, irrespective of that to which they are entitled as members of a tarwad. Whichever of these two plans is to be preferred, the learned Judge is averse to introducing a judicial system of divorce, and would leave it to the parties themselves and their friends to arrange the separation just as they do now. He would make no distinction between the Hindus of Malabar and those of other provinces as to the Courts before which, or the mode in which, matrimonial disputes should be brought for judicial determination. Only he recommends the reference to caste panchayats of questions of conjugal frailty, believing that such tribunals being familiar to the people would be accepted by them as appropriate for the investigation of such matters. The scheme of divorce preferred by those Commissioners, who would fain see caste restrictions ignored and a statutory form of marriage established, follows the lines of the Divorce Acts as well in respect of substantive rules as with regard to machinery. Dissolution of marriage is to be effected only by judicial decree, and only for the reasons on account of which such decree can be given under the Statutes. It is almost enough to say of this scheme that it is most unpopular. A remedy which involves publishing in open Court the secrets of domestic life would be most unwelcome to the respectable classes among Nairs as among other Hindus.

The Commissioners, who desire to adopt Western methods to solve the social difficulties of Malabar, do not seem sufficiently to realize the importance of making their scheme acceptable to the people. It has to be remembered that in all probability for some

time to come the large body of Malayalis would follow their ancient customs and decline to submit themselves to the new law. The Marumakkathayam system cannot be abolished by a stroke of the pen. The difficulties of effecting a transition from this system to one in which marriage is the cardinal institution are great; but surely the best chance of success lies in an endeavour to build up a new system upon the foundations of the old. A marriage law, framed on any other principle and in disregard of popular sentiments, is only too likely to remain a dead letter.

The last point concerns the devolution of property. At present so far as there is any inheritance among Nairs, it is, as has been observed, a man's brothers and his sister's children that count as his heirs. His own children do not form part of his family, and are in no sense his heirs. It is clear that, as soon as the relationship between father and children comes to be recognized, the law of inheritance which ignores that relationship must begin to be undermined. The natural desire on the part of the father to make some provision after his death for the offspring of one who is his *de facto* wife may be satisfied in two ways. It may be enacted that upon the death of a Malayali intestate his self-acquired property shall descend to his wife and children; or the power of testamentary disposition over such property may be granted to him. To the former which is of course the larger provision, the objection is taken that it goes farther than is needed, and would tend to the disruption of the tarwad system. The introduction of a double system of inheritance is deprecated. The answer to such objections is that, whatever reform is preferred, the legislator must not be afraid of anomalies and incongruities. Any scheme which diverts property from the tarwad, which theoretically is the owner of all the property of its members, is inconsistent with the tarwad system. Widows and children can only be provided for at the expense of a tarwad to which in law they are strangers. The difference between making this provision by means of a will and by means of intestate inheritance is rather a difference of degree than of kind.

Nevertheless it may be well to conciliate public opinion by introducing at first the power of testamentary disposition, as to which the Commissioners agree in thinking that it should be declared to be co-extensive with the power to alienate property *inter vivos*. They go further, and think that this power should be granted whether or not marriage is contracted under the Act. If, however, it is desirable to popularise the new marriage law and encourage marriages under it, it would surely be wiser to make the power of testamentary disposition exerciseable only in favour of the offspring

of a statutory marriage. The enlarged power of disposition might act as a premium in favour of the legal as compared with the social marriage. The same observation applies with greater force to any alteration of the law of inheritance. There would be no unfairness in leaving those who prefer to remain under the old dispensation to be governed by the old law, and on the other hand it would not be reasonable to place the children of a mother, who in law is a mere concubine, on the same level with the children of a regularly married wife with regard to their right in their father's property.

As with regard to the relations of the sexes, so with regard to property, the time has come for modifying the archaic system which, though still generally popular, does not fully meet the requirements of modern life. On the one hand there is the family, founded on the paternal relation, coming into competition with the tarwad representing the matriarchal system. On the other hand there is the claim for a larger recognition of individual ownership, asserting itself as against the system of family ownership represented by the tarwad. The difficulty is that, while the inconveniences of the tarwad system are apparent, it still retains a strong hold on the sentiments of the majority of the people who would doubtless strenuously oppose the introduction of partition and other similar incidents of joint property, as it is held under the general Hindu law.

H. H. SHEPHARD.

SPECIALLY ENDORSED WRITS.

THE Courts of Law have recently been engaged in judicially settling certain questions arising under Order III. Rule 6 and Order XIV. Rule 1 (R. S. C. 1883). These questions are of little importance to the outside world, but to solicitors who are instructed to issue writs on behalf of private clients and large banking companies they are of no little moment.

Mr. Stringer in an able article in the Solicitors' Journal for March 12, 1892, p. 322, shows the gradual development of the process from a decision in *Rodway* v. *Lucas* under the C. L. Proc. Act 1852, s. 25, the 'fons et origo' of Order III. Rule 6, and concludes his article with a doubt as to what is to fix the rate of interest on a bill of exchange, i.e. whether special contract between the parties or mercantile usage. This point has now been partially discussed in the recent case of *London and Universal Bank* v. *Claucarty*, where Justice A. L. Smith in the course of judgment says, 'It is clear that the meaning of Section 1 (Bills of Exchange Act 1882, s. 57) is that the amount of the Bill, the interest, and the expenses of noting or protest are all to be recovered as liquidated damages; and further, by Order XXXVI. Rule 58, where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of assessment, that is to say, down to the date of judgment; and if this provision is to be read with Section 57, interest allowed by law, that is, interest down to judgment, is recoverable as liquidated damages.'

The first two above-mentioned Orders under R. S. C. 1883 enable a plaintiff in five cases to specially endorse his writ; these five cases have been divided by the Editors of the Annual Practice into two classes—first, the recovery of a debt or liquidated demand; secondly, the recovery of land. It is proposed to deal in this article with money due on a contract expressed or implied.

Clearly then, the total amount claimed on the back of the writ must be a fixed liquidated sum only. No unliquidated damages under 3 & 4 William IV. c. 42. s. 28 will be allowed, e.g. if *A*'s solicitor issues a writ against *B* for goods sold and delivered, a claim for interest from date of writ till payment or judgment will vitiate the special endorsement.

(*Sheba Gold Mining Company* v. *Trubshawe*, 36 S. J. 329, '92, 1 Q. B. 674; *Wilks* v. *Wood*, W. N. 58, 36 S. J. 379, '92, 1 Q. B. 684.)

The prompt working of Order XIV. Rule 1 is thus hindered by *Gurney* v. *Small* (W. N. 1891, p. 168) which renders amendment impossible after appearance. A new rule is really necessary to enable amendment possible where there is no defence on the merits by giving the Court of Justice or Judge discretionary power to allow a defect in a special endorsement to be removed.

A very simple method of attaining this desirable object would be to add a subsection to Order XIV. Rule 4, giving the Court or Judge discretionary power to remedy any technical defect in the special endorsement and to give judgment for the part of the claim not affected by it.

Such an addition to the Rule named would be in complete harmony with the existing rule, and would enable 'the Court or a Judge' to prevent the machinery of Order XIV. from being thrown out of gear by some trifling technical error in the special endorsement of the writ without in any way interfering with Order III. Rule 6, or Order XIV. Rule 1.

The legal subtleties of the numerous recent decisions are evinced in the cases decided on Bills of Exchange and Promissory Notes. Under the Bills of Exchange Act 1882, section 57, 'Where by this Act interest may be recovered as damages such interest may, if justice require it, be withheld wholly or in part, and where a Bill is expressed to be payable with interest at a given rate interest as damages may or may not be given as interest proper.' There are then three things recoverable, viz. the amount of the Bill, interest, and the expenses of noting or protest; but not (it is to be observed) bank expenses. The ordinary mercantile rate of interest is five per cent., and in an action on a dishonoured Bill the writ may be endorsed with the amount due on the Bill with mercantile interest thereon—*London & Universal Bank* v. *Clancarty; Lawrence & Son* v. *Willcocks*—also notarial fees, but not banking expenses. Promissory Notes being like Bills of Exchange mercantile securities have always carried interest (see Williams' Personalty, 13th Ed. pp. 160, 161) and, as it appears to the writer, subject to the Court's discretion a writ may now be specially endorsed for the amount due on the Bill or Note with interest from the issue of the writ until payment or judgment at the rate specified in the Bill or Note, or if no rate expressed at five per cent., but if the plaintiff claims interest as damages under 3 & 4 William IV. c. 42. s. 28, the special endorsement may be upset (*Lawrence & Sons* v. *Willcocks*, L. R. '92, 1 Q. B. p. 696; *London & Universal Bank* v. *Earl of Clancarty*, L. R. '92, 1 Q. B. p. 689). Banking overdrafts which sometimes in the case of country banks are of large amount might, it is thought, be the subject of special endorsement with a claim for interest at the

customary banking rate. The Plaintiff Co. should be prepared to prove the custom by affidavit of other bank managers in case of opposition. As yet there has been no decision on this point.

In connection with the case of *Elliott* v. *Roberts* must now be read the judgment of Justices Mathew & Smith in the case of *Gold Ores Reduction Co.* v. *Parr* (W. N. 1892, p. 96) where it was held that as the writ did not show that the interest claimed was payable under an agreement there was not a valid special endorsement, that the fact that the affidavit showed an agreement to pay interest could not make the endorsement good, and therefore that judgment could not be entered under Order XIV.

No doubt the reports will be full of these cases until a new rule as suggested above is passed.

Before concluding these remarks the writer wishes to express his thanks to Mr. F. A. Stringer for many useful suggestions and kind assistance in the preparation of this article, in which these few cases only have been dealt with, because as yet the Judges' decisions have left the other claims under Orders III. and XIV. incomparative clearness. There is no doubt that the summary method given under these Orders requires amendment as before stated, but it is hoped that the Courts of Law will keep a strict hold upon mercantile Shylocks and the rate of interest they may wish to recover and that the 'discretion' given in the Bills of Exchange Act 1882 will be widely exercised.

Moreover it seems desirable to add in conclusion that in the four cases of interest upon debts which have been briefly reviewed in this article, the fine legal distinctions involved render both care and accuracy necessary qualities for solicitors seeking to recover for their clients fixed liquidated demands.

C. L. Mathews.

MASUIRS[1].

'MASUIRS' (mansionarii, mansuarii) was in the Middle Ages one of the many words used to denote the inferior tenantry on an estate. When 'mansus' signified a rustic holding, 'mansuarius' signified the rustic who occupied it. The word was used to represent much the same class as 'hospites,' 'manants,' or our own copyholders; but although it fell into comparative disuse, yet in several parts of Belgium there remained certain people known as 'masuirs' down to a few years ago, the settling of whose rights seems to have given a good deal of trouble to the lawyers of that country.

In the case of the masuirs de Chatelineau, otherwise called 'masuirs de St. Barthélémy,' who exercised certain rights in a wood called 'la Flichée,' M. Errera has found a series of documents relating to their affairs, which he has discussed at length in the book before us. He has also brought forward a number of cases of a similar kind, but not so fully illustrated by documents; and upon these pegs he has hung a learned disquisition on the whole subject.

There is no doubt that he has many of the necessary qualifications for the work, but it is desirable in the interests of English students that we should explain the particular bent of M. Errera's mind. He was led to the study of the subject by the works of M. de Laveleye. His creed is the so-called 'mark' system, and common ownership. When we read that the château de Maele 'rappelle par son nom . . . le mallus, lieu de réunion de l'assemblée judiciaire' (p. 307); when, after a description of an ordinance of the *veldheeren* of the seventeenth century, we read: 'Comment ne pas voir dans cette assemblée du printemps, l'équivalent de l'ancienne réunion des hommes libres au champ de mai' (p. 253), most of our readers will know the colour of M. Errera's spectacles.

M. Errera is also subject to what, if it was not so very common among them, one might call a peculiarity of French lawyers and historians. The feeling with which they regard what they consider the feudal system, the seigneurs, rent-services, villein-services, the cour foncière, and the like, really almost unfits some of them to deal with the subject. It seems as if their ideas were still wholly derived

[1] Les Masuirs. Recherches historiques et juridiques sur quelques vestiges des formes anciennes de la propriété en Belgique. Thèse d'agrégation, présentée à la faculté de droit de l'université de Bruxelles. Par PAUL ERRERA. Bruxelles, 1891. (Thèse), pp. xv and 542; (Preuves), pp. vi and 320.

from the sentiments of the Great Revolution. M. Errera (p. 387) quotes with approval a passage (too long to insert here) from a work of Championnière, a passage which is an excellent illustration of this peculiarity, and for which the only excuse possible is that it was written in 1846. As an instance of the operation of these feelings, we may refer our readers to p. 428. M. Errera finds a number of instances of 'cantonnements,' or what we should call enclosures, operating like our Enclosure Acts of the eighteenth century, at once as enclosures, partitions, and allotments: he sees that these are all expressed to be by consent of the seigneur and commoners; and then he asks the very pertinent and proper question, 'Qui descendra jamais jusque dans l'intimité de ces actes anciens et recherchera la mesure exacte de ce qu'ils avaient de volontaire pour l'une et l'autre partie!' The note of admiration, where in a more historically scientific work we should find a note of interrogation, gently prepares us for the revelation that the discoverer of the secret is our author himself. 'Trop souvent, la forme établissait entre les humbles et les grands une apparente égalité, qui n'effaçait pas la dépendance des uns à l'égard des autres; la si longue résistance que les communautés opposèrent tant de fois aux conventions et aux sentences auxquelles elles avaient concouru, montre les antagonismes profonds que cachaient ces accords.'

The reader must not suppose that M. Errera is what we should call a prejudiced writer, on the contrary, he is a sincere and honest investigator; he so regularly gives us chapter and verse for his statements, that when he fails to do so, as in the passage last quoted, it is obvious that he considers the matter self-evident. The fact is that an education on the Code Napoleon and the Roman law is a positive impediment to the understanding of the feudal law of the Middle Ages. The attempt to explain subinfeudation and tenure in the language of 'la directe,' and 'l'usufruit,' is like trying to fit square pegs into round holes. M. Errera confesses (p. 506) that 'la loi civile ne connaît rien de ce qui touche aux masuirs et aux masuages.'

Now the masuirs as they appear described in the present work will be found extremely interesting to us in England, especially just now, when we are trying to digest, or perhaps to swallow, Mr. Vinogradoff's Villainage in England. Under the feudal system, 'mansionarii' are found contrasted with the 'homines feodales' (p. 443); but they appear to owe fealty in 1340 (p. 475, n.). Their principal characteristics are 'morte-main' and heriots (p. 444); they are found paying a relief, 'requisitio terrae,' in 1239, and most often they occur on abbey lands (p. 448). In the year 1201, it is only the tenure that is servile (p. 450), and there are traces of a

sort of sub-holding among them, 'submansionarii' (pp. 461-2). We never find common agriculture among the masuirs, but they occupy small holdings and exercise rights in a wood, pasture, or moor (p. 440).

Now M. Errera's conclusion is that the rights of the masuirs are communal property, that they belong not to individuals, or to a corporation composed of individuals, but collectively to the commune. We prefer to give his conclusion before describing the way by which he arrives at it, because it seems that we shall thus follow more closely the order of his own ideas. The solution of the question depends partly upon the original legal condition of the masuirs, and partly upon the alterations in that condition which have been effected by subsequent transactions and subsequent legislation. The discussion of their original status is one which must always be of the greatest interest to all students of legal history; their subsequent development, so far as due to the natural and gradual modification of legal ideas, is also extremely instructive, but the effect of the deluge described by M. Errera with delightful, if unconscious irony, as 'les lois révolutionnaires dites abolitives de la féodalité' (p. 382), and of later legislative or administrative acts founded upon similar ideas, has been simply destructive. 'Les sociétés se dissolvent aujourd'hui presque toutes, sous la crainte qu'inspire une situation en desharmonie avec nos lois' (p. 231).

And no wonder. Regard the case of the commoners at Donckt. M. Errera transcribes in his Preuves, No. xli, two charters of 1253 and 1263 respectively, by which the lord grants to his tenants the right of putting their cattle to pasture in a certain wood. 'Presque telle que nous la décrivent ces deux chartes,' says M. Errera, 'l'administration du Donckt s'est maintenue jusqu'en ces dernières années . . . En 1881 le département des finances émit l'avis que le bien appartenait à la commune, aux termes des articles 1 et 2 de la loi du 10 juin 1793, et l'ancienne direction devait être modifiée' (p. 337).

Probably in the course of time, records illustrating the same principles may be discovered in the archives of the 'Concilium Comitatus Lundon.' but at present Belgium seems to be the most likely place to find them. Very few of the masuirs described in M. Errera's book have escaped confiscation on one quibble or another for the benefit either of the State or the Communes. The operation is amusingly designated by our author as 'leur entrée dans la vie administrative moderne' (p. 510).

In order that the commune may be entitled, it is not enough to show that the enjoyment by the masuirs was enjoyment as by a corporation; it must be shown that their enjoyment was enjoyment

by the commune, for otherwise the commune's claims would be excluded by those of the State, which has succeeded to the possessions of lay corporations (p. 61). Any symptom of united action is liable to be interpreted as corporate activity. And so the poor masuirs are placed as it were between the devil and the deep sea. One wonders what can be the good of Recherches historiques et juridiques under such a régime. However, it is a little ungracious to quarrel with a state of things which after all is the occasion of the very interesting work before us.

The question whether the woods and pastures, in or over which the masuirs exercised their rights, can be taken for the commune, is connected with the question whether the masuirs were owners of the soil or whether they were only commoners. In the latter case the commune would not now be considered to have the ownership of the soil. M. Errera therefore argues that the property was not in the lord but in the masuirs, and that the masuirs were in fact the commune.

To an English lawyer, at least, until he has unlearnt what he was first taught, the original position of the 'masuirs' and their rights presents no difficulty whatever. If we discard so much of the notion of a copyholder as suggests his holding by copy of court roll (not an impossible supposition when we think of customary freeholds and freehold tenants of a manor), we may say that the masuirs appear from M. Errera's researches to have been copyholders. They held a rustic's holding with common appendant. The rights of common possessed by copyholders in the waste of the manor are certainly rights of property. But they are not ownership of the soil of the waste. Here M. Errera finds a difficulty. How can a man have 'propriété' in a wood, when the wood is 'propriété' of the seigneur? In a document of 1479, distributing a wood between the seigneur and the masuirs, M. Errera finds an expression which, with reference to the part assigned to the masuirs, declares that 'ils l'auront héritablement.' 'C'est la propriété,' says our author, 'et nul autre droit, qu'on exprime ainsi: encore n'emploie-t-on cette locution, de même que le mot *héritage* et tous ses autres derivés, que pour désigner la propriété foncière.' He has other and much better arguments to prove that this document gave to the masuirs in question the ownership of the soil as distinguished from a mere right of common; but this particular argument is strikingly illustrative of the disadvantages under which he labours in trying to understand early feudal documents. Indeed it is very doubtful whether he would allow even a corporeal tenement held by copy to be 'propriété.' He might say, I understand that he can have 'usufruit' or 'dominium utile,' but how can he possibly have 'propriété'?

These difficulties are not peculiar to French lawyers. The curious reader may perceive the same phenomenon in Craig's Jus Feudale, but the Scotchman was familiar with feudal ideas in his own country, and consequently found the difficulty, though serious, not insurmountable with the help of a 'dominium directum sub modo' or 'secundum quid,' and other satisfactory devices.

Now the French applied the terms 'tréfonds' and 'tréfoncier' to indicate the seigneur and his property in the soil, and the first chapter (beginning at p. 344) of M. Errera's Partie Synthétique is devoted to the explanation of these terms, and is one of the most interesting parts of his work. The 'tréfoncier' usually claimed a 'cens,' i. e. a rent or render, reserved upon his grant, as we should say. He could seize for rent in arrear (pp. 370, 449), and the operation was called 'dominicare' (deminement). He had his court 'cour trefoncière,' generally composed of a maire and seven échevins named by the seigneur (p. 364), administering 'basse justice' or 'justice foncière,' i.e. over the 'hospites' (p. 365), 'quos alii mansionarios vocant' (p. 366, n.). In the case of the masuirs we find this court called 'cour des masuirs' (p. 474), and it was very like our customary court of a manor. It had not 'haute justice,' this belonged to another court of the lord. The two courts became in time confounded and amalgamated, and we find the higher court, 'cour féodale,' alone surviving (pp. 104, 475). Amongst M. Errera's Preuves, p. 150, No. xxix, there is an admittance of a 'masuir' at a court by the maire and échevins, closely corresponding with the admittance of an English copyholder. In the fusion of the two courts of the lord, the English reader will at once see an analogy to the fusion of the court baron and the customary court.

If Mr. Vinogradoff is going to persuade us that our own court baron and customary court were originally one and the same court[1], which in course of time developed into two, and subsequently again merged into one, he will have to show how the same effect was produced in Belgium, or else to explain why the feudal lords in Belgium required two courts from the first, while their analogues in England managed with only one. Without presuming to say that Mr. Vinogradoff is mistaken, it may be thought that his doctrine on this point is rendered by M. Errera's researches a little more difficult to accept.

At the end of the Middle Ages, M. Errera finds that the lords everywhere appointed paid magistrates, who replaced the 'peers' of former times (p. 473). And he cites a charter of the twelfth

[1] I do not think Mr. Maitland would go quite so far as this (Select Pleas in Manorial Courts, pp. xvi–xvii).

century dispensing the masuirs from suit of court on condition that their rent-service, 'cens,' was not in arrear (p. 473).

Now let us follow our author a little further in his investigations. Naturally there was a bond between the tenants of a single estate. They had common interests. But M. Errera admits that this is not far towards 'la vie corporative indépendante, la personnalité juridique' for which he is looking. The seigneur bargains on behalf of the masuirs (pp. 454–5). It is he, and his estate, that constitute the lien between them (p. 440). Their corporate existence begins to dawn in the thirteenth century (p. 457). But if Charles the Bald declared the 'mansi' hereditary in 864 (p. 432), and if, as our author thinks, this was only a recognition of an already existing state of things, this supposed corporate existence looks somewhat imaginary, or at least prehistoric. The point seems to be appreciated by M. Errera, and accordingly we find him in another passage (p. 482) expressing the belief that transmission by 'hoirie' is not so ancient as the institution of masuirs itself. He seems here to have forgotten all about Charles the Bald and his edict of 864.

However this may be, among the numerous cases of masuirs cited by M. Errera, there certainly appear some that have either become, or originally were, the commune of the place. Nothing is more natural. The tenants on the estate are those who enjoy the rights of common; the tenants on the estate are also those who constitute the village commune; it is perhaps easier to run the two characters into one than to keep them distinct in one's mind or in reality.

It is clear that our author is under the impression that there is no alternative theory between that of original and primitive property in the community over these forests, and that of a grant from the lord of rights of common, reserving the ownership of the soil (pp. 436–7). The dilemma, if it really exists, is certainly serious; but it does not exist. Mr. Scrutton has taken the trouble to explain the matter in the LAW QUARTERLY REVIEW, vol. iii, p. 373 (Oct. 1887). Mr. Vinogradoff's remarks upon 'recognition' are also in point. If, for whatever reason, all parties agree that their legal relations shall be such as would follow from a grant from the lord, then (unless such an agreement can be rescinded) the legal result is the same as if there had been an actual grant from the lord. And such an agreement may be created by or implied from acquiescence, even after resistance. We are at liberty therefore to consider the legal question, ownership or right of common, unhampered by this dilemma

Now our author declares that in claiming the ownership, the seigneurs 'se heurtèrent à un sentiment populaire plutôt qu'à un titre' (p. 511). Without going so far as to say that this admission

puts him out of court,—because Englishmen recognise as true laws the unwritten laws of custom,—we may very fairly ask for the evidence that there was any such 'sentiment populaire' as is here suggested. There seems on the other hand plenty of evidence against it. The masuirs of Chatelineau for instance clearly had not ownership of the soil down to 1479, and M. Errera admits as much (pp. 60–6). In 1289 we have a clear case of a lord taking money for rights which on the author's theory did not belong to him (pp. 394–5). The prince-bishop of Liége, seigneur of the wood of Mettet, in 1569 agreed to a division of the wood. The bishop's ownership is recognised, subject to what we should call common of estovers vested in the commonalty. The commoners have encroached beyond their rights. An agreement is therefore made by which the commonalty are to take a fourth part of the wood in severalty subject to certain restrictions as alienation and waste imposed by the bishop. The property in this one fourth (the 'domaine utile' as M. Errera calls it, and possibly at this date, 1569, the word is not so inappropriate) is transferred to the commoners or the commune, and in return the remainder is freed from the rights of common. The transaction is simple and intelligible. But M. Errera, the lawyer, perceives that the restrictions do not square with the correct legal notions of a cantonnement. 'Ce n'est pas un propriétaire ni un contractant qui parle ainsi,' says M. Errera; 'le prince stipule comme souverain . . . et prend une mesure de police forestière' (p. 397). To such straits is an ingenious man driven by the incompatibility of two systems of law.

It must be admitted that where the right is to cut wood, there would be a good deal to be said for the view that inasmuch as this is the only way of using the wood it shows the exercise of the only rights of ownership which can be exercised, and is therefore evidence of ownership; at all events in cases where there is no evidence in favour of the contrary theory. This argument is duly claimed by M. Errera (pp. 402–3).

Now if we find that the rights of the masuirs in a wood or pasture are proportioned to the size of their holdings, that fact would be a very strong argument in favour of the rights being what we should call 'appendant' to their holdings; and as there is no suggestion that each holding was anything but the individual property of the tenant, it would seem to follow that the rights of common equally belonged to individuals, and were not the collective property either of the commune or even of a corporation consisting of the masuirs.

But the force of this argument from an equality of rights of common would be very much diminished if the holdings themselves

were equal. M. Errera asserts that the holdings were in fact equal, and consisted of twelve boniers each. Where he finds the evidence of this we are not told. He admits that so early as the ninth century the holdings had become of various sizes (p. 431). The rights of common, he tells us (p. 462), were limited more by the wants of the family than by the size of the holding, 'comme tous les droits usagers.' But again he gives no authority for this statement. His theory is ingenious; that originally there was no need to put any restriction on the exercise of these commonable rights, but that when in course of time it became necessary to take measures to preserve the wood or the pasture, the regulations to that end naturally looked to the proportionate sizes of the holdings, and to what we know as 'levancy and couchancy' (p. 463). But M. Errera, the investigator, admits that regulations based on this principle date from very remote times, possibly from the time of the 'Leges Burgundionum,' i.e. early in the sixth century. M. Errera, the advocate, replies that at that time the holdings were in fact equal (p. 464). But surely the passage from the Burgundian law implies the contrary. 'Quicunque agrum aut colonicas tenet, secundum terrarum modum vel possessionis suae ratam, sic silvam inter se noverint dividendam.' Our author concedes that what he calls 'le principe ancien,' viz. equality of the holdings, did not last till the thirteenth century (p. 464); and under the circumstances this cannot be considered as any great concession on his part.

It seems that in course of time the masuirs of Chatelineau increased in number to such an extent that the wood became insufficient to meet their requirements; and the result was that the poorer set were excluded. At all events in the sixteenth century a regulation was made by which the rights in the wood of Flichée were limited to those masuirs who owned holdings of a certain size (pp. 108–9). In other cases the necessity of limiting the number of commoners led to the adoption of other rules, as for instance a rule by which a certain parentage became a condition of exercising the right of a masuir; and M. Errera ingeniously suggests (p. 482) that this was the way in which hereditary descent came to regulate the transmission. Perhaps; but if hereditary right is no part of the original institution, what becomes of his argument, noticed above, from the use of the word 'héritablement'?

The history of the masuirs of one locality was by no means the history of the masuirs of another; the different communities seem to have developed independently of each other; they have, if one may say so, fared differently during their lives, and met with sundry kinds of death. There is a real case of masuirs claiming property

in a pasture in 1267: and in 1255 some *amborgers*, which seems to be the Flemish form of masuirs, claimed and were allowed a share in the fines for certain offences; a claim which M. Errera interprets, and probably with justice, to involve ownership (p. 466).

There are many points on which these ancient Belgian institutions present a striking resemblance to what we are acquainted with in England. For instance we find traces of something like the 'mercheta mulierum' (pp. 481, 483). The lord's right of common together with his tenantry is another point. This gives a great deal of trouble to our author, as it does to Mr. Vinogradoff, though it seems very simple on the theory of the lord's ownership of the soil. Although M. Errera admits that the lord as an institution is an essential and original part of the village arrangement, dating in fact from the first establishment of the Franks; yet the lord's rights of common were in the author's opinion only those of one among many masuirs. The change is due to feudal oppression. If the lord's rights are found to be larger than those of a masuir, then they have been increased by usurpation. Residence on his holding is essential to the exercise by an ordinary masuir of his rights, while the lord is dispensed from this necessity; again the exception is due either to the fact that as representing sovereignty the lord is deemed to be always present, or else to 'le bon plaisir d'un maître que l'on craint.' From the twelfth century or earlier an abandoned holding reverts to the seigneur; it is 'expropriation.' After all, what is the good of a theory if it will not do the work it is intended for? But one is inclined to require an explanation of the curious fact that feudal tyranny developed itself in different countries in so strangely similar a manner. The uniformity displayed by it throughout England is perhaps due to the law and the lawyers, as Mr. Vinogradoff has taken pains to explain; but M. Errera does not inform us whether a similar cause operated in his own country. And even if it did, what was there to produce so much similarity between the phenomena appearing in these two countries, to say nothing of others?

Perhaps M. Errera would say that feudal tyranny is the same everywhere. Would it not be worth while to try to find some principle in feudalism itself, feudalism (if one may say so) in the abstract, apart from its modifications in different countries, which would explain the facts upon a principle more likely to work with uniformity than the sporadic selfishness of individuals acting against 'antagonismes profonds'?

G. H. Blakesley.

THE EXSHAW CASE.

AN action, *Exshaw* v. *The Prefect of the Gironde*, which was tried last July before the Civil Court of First Instance to test the application of the new French military and nationality laws to British subjects born before they came into operation, has caused a good deal of attention owing to the somewhat wolf-and-the-lamb interpretation put upon these laws by the French government. The difficulties arise out of the following state of the law:

Art. 11 of the Military law of the 15 July, 1889, at present in force in France, provides that

'Les individus déclarés français en vertu de l'article 1er de la loi du 16 décembre 1874, sont portés dans les communes où ils sont domiciliés sur les tableaux de recensement de la classe dont la formation suit l'époque de leur majorité. Ils sont soumis au service militaire s'ils n'établissent pas leur qualité d'étranger.'

This law of 1874 (16 December) declared:—

'Est Français: tout individu né en France d'un étranger qui lui-même y est né, à moins que dans l'année qui suivra l'époque de sa majorité, telle qu'elle est fixée par la loi française, il ne réclame sa qualité d'étranger par une déclaration faite soit devant l'autorité municipale du lieu de sa résidence, soit devant les agents diplomatiques consulaires de France à l'étranger et qu'il ne justifie avoir conservé *sa nationalité d'origine* par une attestation *en due forme de son gouvernement*, laquelle demeurera annexée à sa déclaration.'

Thus by the most recent law governing the subject, the sons born in France of foreigners themselves also born there, are not called upon to serve in the French army, provided they have complied with certain formalities.

The French government does not however observe the law. The military authorities do not consider themselves bound by the Military law in this particular, but by an earlier one, viz. that of the 26 June, 1889, which says:—

'Art. 1 et 2.—Sont Français . . . . . .

'3° Tout individu né en France d'un étranger qui lui-même y est né.

'Art. 16.—Sont abrogées . . . les lois des . . . 16 décembre 1874.'

Parliament, they say, made a mistake in the law of the 15 July. They meant to refer in it to the law of the 26 June, 1889, and not

to that of the 16 December, 1874, which they had just repealed the month before.

They go farther than this, however. The law on nationality of 1889 having declared 'every person born in France of a foreigner who himself was there born' to be French, the French government declares that this law applies to everybody so describable, and that its terms and its intention of making as many soldiers as possible implicitly make it retrospective. Thus a lad born before it came into operation is declared by them to be French irrevocably, though he may have been brought up to his twenty-first year all but one day, and have shaped his life under the belief that he was a foreigner, and had the right of claiming his foreign nationality as soon as he reached maturity.

The difficulty has been further complicated by a judgment of the Court of Cassation (*Hess* case, December 7, 1891), which has decided that the word *étranger* in the law of the 26 June, 1889, includes women.

Thus under the construction of the French military authorities the son born in France of an Englishman is irrevocably French if his father or mother was born in France, and it is of no import to the issue if this son was born before or after the coming into operation of the law of the 26 June, 1889. Nor is it the later law of the 15 July, 1889, but the earlier law of the 26 June that governs his status.

The Exshaw action was brought against the Prefect of the Gironde, representing the State, to test the law in the Law Courts on behalf of the leading British subjects in France who are affected by the change in question.

The plaintiff did not enter into the question arising out of the *Hess* case, his father having been born in France, but contended on the points affecting him that in case of conflict between the provisions of two acts on the same matter, the later in date was applicable on the principle *Lex posterior derogat priori*, a principle without which a legislation would of course be a mockery. He also appealed to art. 2 of the Civil Code which specially provides against laws being enforced retrospectively. It says: 'La loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif.' The plaintiff maintained that he had a certain right under the law of 1874, the right to claim at twenty-one years of age a certain status, that a right is not dependent for its existence on the time having arrived for exercising it, that the terms of the law of 1874 are precise in declaring him a foreigner during his minority, and recognising his right at a specified time to prove he has retained his foreign nationality, and that to forcibly change his status after he had shaped his career accordingly

during the years when the foundations of it are laid was contrary to the law of France as expressed in art. 2 of the Civil Code in the absence of any legislative enactment to the contrary.

The plaintiff, however, rested his case not only on arguments drawn from the general and common law of the land, but also on the special ground that the construction of the Military authorities was contrary to special Treaty rights granted to British subjects by the Anglo-French Convention of the 28 February, 1882.

This Convention, its preamble states, was made

to regulate the commercial and maritime relations of the two countries as well as the status of their subjects.

à régler l'état des rélations commerciales et maritimes entre les deux pays, ainsi que l'établissement de leurs nationaux.

It was signed in English and in French. It will be observed that *établissement* is given as the equivalent of status. One of the articles relating to the *établissement* of the subjects of the High Contracting Parties in the two countries is as follows:—

The subjects of the High Contracting Parties shall be exempted from military service, requisitions, and contributions of war, forced loans, advances, and other contributions leviable under exceptional circumstances in so far as these contributions are not imposed on landed property.

Les ressortissants de chacun des deux Etats seront exempts, dans l'autre, de tout service militaire, de toutes réquisitions ou contributions de guerre, des prêts et emprunts et autres contributions extraordinaires qui seraient établis par suite de circonstances exceptionnelles, en tant que ces contributions ne seraient pas imposées sur la propriété foncière.

The French procedure for giving force of law to an International Convention is to adopt it bodily as a special Act of Parliament. This was done on the 13 May, 1882. It was presented to the Chamber of Deputies with the report of the Parliamentary Commission which had examined it. This report, summarising its provisions, stated that 'les autres articles donnent aux nationaux des deux Puissances d'importantes garanties au point de vue du transit, de la navigation, des marques de fabrique, et *leur assurent des exemptions spéciales en ce qui touche au service militaire.*'

The plaintiff maintained that if he was a British subject during his minority and had been treated as such by the law of France, he was entitled to the protection of the Convention and was exempt from military service.

He was not born a Frenchman, the law of 1874 having specifically referred to his nationality of origin being foreign, and required a declaration by his government that he had retained this nation-

ality of origin. The word *his* refers to the foreign government. The plaintiff contended that his nationality of origin being British and the law of 1874 being in force when the Convention of 1882 became law in France, he was entitled to claim the exemptions provided therein, and that on the principle well admitted in French law: *Legi speciali per generalem non derogatur*, apart from the fact that the International Convention in itself is binding outside the general law, the General Act of 1889 does not interfere with special enactments relating to a particular class of persons.

The judgment of the Court of First Instance at Bordeaux (July 11, 1892) passes over article 11 of the Military law entirely. It declares, without explanation, that, according to the law of 1874, the plaintiff during his minority was French, and that, therefore, the Convention of 1882 does not apply to him.

It admits that he had a right, but holds that it was not a *droit acquis* (vested right), that it was a mere *expectative* and would only have been a *droit acquis* if the lad had reached his twenty-first year when the law of the 26 June, 1889, came into operation, and could have actually at once exercised it.

It will be interesting to see how the higher Court deals with the questions submitted, not perhaps so much as a matter of law, as this is clear enough, but as a matter showing to what extent Law Courts in France are independent of government, and can be relied upon to apply the law without reference to any consideration but its provisions.

THOMAS BARCLAY.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Handbuch des Handelsrechts. Von L. Goldschmidt. Dritte völlig umgearbeitete Auflage. Erster Band: Geschichtlich-literarische Einleitung und die Grundlehren. Erste Abtheilung. Universalgeschichte des Handelsrechts. Erste Lieferung, Stuttgart: Ferdinand Enke. 1891. 8vo. xviii and 468 pp.

The introduction to the third edition of Geh. Rath Goidschmidt's classical (but unfortunately uncompleted) handbook on mercantile law forms at the same time a separate work on the history of the subject, to be published in two instalments, of which the volume now before us is the first. The author is well known as the foremost living mercantile lawyer both in respect of historical learning and of practical knowledge. As a judge of the Supreme German Mercantile Court (the first Supreme Court of the new German Empire), as one of the most active and influential promoters of mercantile legislation, and as a teacher and author, he has been one of the men whose work has shown that historical learning is a help and not a hindrance to those who are engaged in the solution of important practical problems. The book before us, on the other hand, proves that the monuments of the past are best understood by those who are familiar with the manifestations of the present. Our Law Merchant is now part of the Common Law, but it need hardly be pointed out that at one time it was a separate system, applicable only in respect of dealings between traders, and that even at the end of the last century the opinion that there were special rules of law, applicable to such dealings only, had by no means disappeared. On the continent 'Handelsrecht' ('Droit Commercial') is still a separate body of law, which, notwithstanding local variations, is fairly uniform in its leading characteristics. The object of Geh. Rath Goldschmidt's work is to trace the evolution of this system of legal rules. His researches begin at a very early period and include Eastern and Western countries. Documents relating to mercantile transactions in Assyria, dating back as far as the seventh and sixth century before the Christian era, engraved on tablets in cuneiform character, tell us of mercantile associations, credit and interest transactions, contracts, sureties and mortgages, agency and assignment. As regards Greece, some institutions of Mercantile Law are traceable in Attica. Among these may be mentioned the privileged position of foreign merchants—as distinguished from strangers generally—and the special procedure which, as it seems, was applied to mercantile litigation (*δίκαι ἐμπορικαί*). Trade generally was not considered as an occupation worthy of a free citizen, but it was less derogatory to a man's dignity to trade on a large (*ἐμπορία*) than on a small scale (*καπηλεία*). The *τραπεζίτης* performed the functions of a modern banker, and the disgrace attached to trade did not prevent the higher classes from deriving income from 'foenus nauticum.' Roman legal literature does not

throw much light on the origin and development of mercantile law. The logical mind of the classical jurists could not conceive any set of circumstances to which the ordinary rules, modified 'utilitatis causa' in cases of hardship, were inapplicable. There were, however, in classical Roman Law a number of legal institutions created for the convenience and by the necessities of commerce. The 'actio exercitoria' by which the validity of contracts made by agents on behalf of their principals was first recognised, the 'receptum argentarii' to which Geh. Rath Goldschmidt assigns the place of a modern banker's acceptance, the 'receptum nautarum,' &c. which imposed special liabilities on certain classes of traders, the 'foenus nauticum,' which has since been changed into the modern 'bottomry bond' and which then took the place of mercantile insurance, while at the same time performing some of the functions of a bill of exchange, the rules relating to warehouses (horreae), &c. are all conspicuous instances. But, as Geh. Rath Goldschmidt points out, the mercantile customs, which were elements in the formation of mercantile law, cannot be adequately ascertained from the Corpus Juris. As the etymologist cannot dispense with the study of conversational and provincial Latin, the historian who wishes to trace the influence of Roman law must inquire into provincial and local customs. Law has its dialects like language, and the dialects of Roman law which Geh. Rath Goldschmidt—adopting an expression invented by Professor Brunner—describes by the comprehensive name of 'Vulgarrecht,' and about which a great deal may be learned from lay writers like Plautus and Livius, as well as from inscriptions and other similar sources, throw much light on the subsequent development of mercantile law. Expressions like 'recipere,' 'accepi,' 'permutare,' 'commendare' (derived from 'cum mandare'=manui dare), had technical meanings well understood in everyday life but ignored by the jurists. The last-named word describes a transaction which under the name of 'commenda' has played an important part in mediaeval mercantile life (the modern 'société en commandite' being one of its developments), but which in legal literature is hidden under the head of 'depositum irregulare.'

The most noticeable fact after the foundation of the Byzantine Empire is the influence on general commerce which the Arabs acquired. Their contributions to mercantile language and usage (e.g. the following words: 'Admiral,' 'Magazine,' 'Average' [awâr=damaged goods], 'Tariff,' also the use of the Arabic figures), and the universality of their trade (Arab coins are found in countries so distant as Russia and Scandinavia) are pointed out by the author, but he has not as yet been able to discover whether their highly-developed system of law has left any trace in the institutions of the West.

In Germany the progress of trade, and therefore of mercantile law, was very slow. The growth of municipal corporations, which originally were associations for the holding of markets, with their own market law (sometimes called 'Kaufmannsrecht' [Merchant's law]); the formation of artizans' companies (Zünfte) bringing the members of each trade under the protection and control of their fellow-craftsmen; the extension of the ancient Merchant guilds (Kaufgilden) and their transformation into powerful organizations for the carrying on of foreign trade (Hanse Leagues) are referred to as incidents in that progress. But the insecurity of the sea as well as of the land, the weakness of the Central Authority and the corresponding importance of territorial divisions, obstructed commercial enterprise in all directions. Commerce on a large scale, as carried on under the old Roman Empire, ceased to exist, and Germanic mercantile customs

were, therefore, evolved out of the customs of small tradesmen and artizans. Geh. Rath Goldschmidt points out that for this reason they were slow to incorporate the ideas of Roman law, and that when that incorporation took place, the institutions derived from Germanic sources had become so firmly rooted that they retained a permanent influence on the general body of mercantile law. The author quotes the following instances of the influence of Germanic habits of thought: the distinction between real and personal property, which in the author's opinion is in close connection with the principle of 'Hand muss Hand wahren' and with the mercantile law of pledge and lien; the 'materialisation' of the law of possession; the substitution of the bottomry bond for 'foenus nauticum'; the restrictions of continental mercantile law in respect of actions for breach of warranty, and on the other hand the development of the doctrine of 'merchantable goods' (Kaufmannsgut, Marchandise loyale et marchande); the introduction of rules relating to the assessment of damages, &c. The connection of the modern law of negotiable securities with the Germanic law of contract is also referred to and explained.

The countries round the Mediterranean formed the centre of mediaeval commerce, and of these the Italian republics were the most powerful and prosperous. The author's elaborate and extensive researches relating to the legal and mercantile history of these republics have enabled him to supply the readers of his book with a large mass of most valuable and interesting facts. These facts are found in numerous byelaws, statutes, and treaties, in legal documents and books of forms and precedents, notaries' journals, and other records giving a direct insight into mercantile life. The body representing the merchants generally ('mercanzia') and the associations representing particular trades (described by various names, as 'ars, misterium [ministerium], collegium, curia, ordo,' &c.), were organised on the model of the municipal corporations of which they formed the principal constituent elements, and were governed sometimes by one 'consul,' generally by several 'consuls' under the assistance of a small and a large council. The list (matricula) of members, assistants, and apprentices—as pointed out by Geh. Rath Goldschmidt—served as a model for the continental registers of traders (Handelsregister) of the present day. The tribunal of the association did not in any way partake of the character of a modern mercantile court, its chief business being the maintenance of order and discipline among the members and the decision of disputes between them in matters concerning the company (causa quae ad artem pertinet—in the case of the general 'mercanzia,' causa mercantilis), and the frequent attempts to define these matters, so as to avoid conflicts of jurisdiction with the ordinary tribunals, have in some measure prepared the way for the modern discussions as to the limits of the province of mercantile law, which on the Continent are of great practical importance. A kind of international law was created by the numerous treaties concluded by the Italian Republics with each other and with foreign states. Many of these treaties referred to the settlements of Italian traders (Lombards) in those foreign countries where no regular colonies and dependencies (logie) were established, and secured to their 'consules' an extra-territorial jurisdiction which has served as a pattern for the consular jurisdiction of our own days. Interesting particulars are given as to these Lombard settlements which have played so prominent a part in the history of mediaeval finance.

The tribunals of the Italian traders' Companies to which we have referred above differed in character from the 'consulatus maris'—the authorities established by the shipowners' guilds in various Italian, French and Spanish

cities. The 'consulatus maris' of Barcelona is specially referred to by Geh. Rath Goldschmidt on account of its great influence on the development of maritime law. The shipping guild of that city, 'Commune riparie Barchinonae,' existed in the middle of the thirteenth century, and seems at that time to have had a concurrent jurisdiction with the royal authorities, but it was gradually merged with the municipal corporation to whom in 1347 the privilege was granted to appoint a judicial and administrative board: 'consules maris et judicem eorum.' The Judgments and Regulations of this Board are the foundation of the 'Costumes de la mer' which have been published in several collections and translations, and form an essential part of modern maritime law. The maritime tribunal of the island of Oléron has had a similar influence.

Much attention is given to the mercantile history of France, and more especially to the fairs of the Champagne and Lyons which seem to have been meeting-places for the traders of the whole of Europe, being convenient centres not only for the buying and selling of goods, but also for the collection and discharge of debts, for which latter purpose a regular clearing-house system seems to have been established.

Having thus described the mercantile life of the various Continental nations, Geh. Rath Goldschmidt proceeds to trace the history of the individual institutions of mercantile law. The commenda, a favourite form of investment for the mediaeval capitalist, has already been referred to; the modern partnership (the mediaeval name for which was 'compagnia,' has a much humbler beginning, having originally served as a form of association for poor artizans who wished to establish a community similar to a joint household ('cum panis'—the analogy with σύσσιτοι is pointed out by the author). In a similar way the other institutions of Mercantile law are traced to their beginnings, one of the most interesting parts of this division of the book being the one dealing with Bills of Exchange. The author shows how they were created by the necessities of the transmission of money from place to place (a transaction known to the Roman 'Vulgarrecht' under the name of 'permutatio'), how they originally consisted of two documents—a promissory note by which the maker bound himself to pay in a foreign, and an order to pay addressed to the maker's foreign agent, and how their modern form was evolved.

The enumeration of subjects given in this notice, though very incomplete, will be sufficient to give an idea of the wealth of material presented to me by Geh. Rath Goldschmidt as well as of its varied and interesting character.

We hope that the book will find many readers both inside and outside the legal profession. E. S.

[The Arabic derivation of 'average' is considered and rejected by Dr. Murray in the Oxford English Dictionary *s. v.*—Ed.]

The Old English Manor: a Study in English Economic History. By Charles McLean Andrews. Baltimore: The Johns Hopkins Press. 1892. La. 8vo. xii (one blank) and 291 pp.

Dr. Andrews of the Johns Hopkins University has done an opportune and useful piece of work in collecting and digesting the present sum of our knowledge as to the Anglo-Saxon origins of the manorial system which prevailed in England through the Middle Ages. This is a study which, as our readers need not be told, offers at every turn difficult and mixed

problems of economic, political, and legal history. For several reasons, among which we must count with regret the complete indifference of most English lawyers to the history of our own institutions, the progress of research has been rather one-sided for the last ten or twelve years, and the economists have perhaps had things a little too much their own way. Whereas our law-books used to treat the judicial aspect of the manor as if it were the only one that called for attention, or did not, even for lawyers, require to be elucidated by reference to the working economy of the rural community, some ingenious writers have lately gone into the other extreme, so that an inquiring stranger might without any great negligence peruse their works and fail to discover that the manor had any definite standing among legal institutions. Mr. Vinogradoff has done much to show the way to due and equitable recognition of both elements; and Mr. Andrews, though he professes to be in the first place a historian of social economy, has now achieved considerable success in holding the balance even between the formal and the practical view of the subject. His book will be profitable to students of legal as well as of economical development.

We likewise find here—perhaps for the first time in an English book—a deliberate judgment on the state of the 'village community' question in the light of such recent examinations of the facts as have been made by Mr. Seebohm and Mr. Vinogradoff, and (on more or less similar ground, though not with specific reference to England) by Fustel de Coulanges. Dr. Andrews may be claimed, I think, as a supporter of the opinion which has been more than once expressed in this REVIEW. He is not by any means persuaded that the time is come to throw away Kemble and Von Maurer; he is willing to learn from all quarters, but in the main he goes with Mr. Vinogradoff and Mr. Kovalevsky rather than with Fustel de Coulanges and Mr. Seebohm. Certain exaggerations, due to the following of the masters without sufficient first-hand work and verification, have doubtless been rightly checked. The Teutonic village community can no longer be taken as a political model for English or German citizens of a constitutional monarchy, or for the republican English of America. We must believe that it was much more of a clan than we were taught some twenty years ago, and we may not believe that the commanding position of lords and chieftains was due to backsliding from primeval equality. But this, as I have pointed out myself, is really what Caesar and Tacitus have been telling us from the first, if we are content to take their words as they stand. It by no means follows that everybody who was not a lord was a slave or the next thing to a slave, or that the agricultural peculiarities of the common-field system have to do with the servile condition of the occupiers. Modern Germans have probably read more meanings into 'folc' and its compounds than ever they had in living Anglo-Saxon; for example, I believe the 'folk-peace' which has crept into one or two English text-books to be wholly imaginary. But it does not follow that an Anglo-Saxon king was despotic in his kingdom, or that a lord's power within his own bounds was not effectively tempered in many things by custom. Not that an effective custom, in a society where there is little writing, not much sense of dates, and no tyranny of caste or priestly tribe, must needs be ancient. The fertility and flexibility of secular and even religious customs, in favourable conditions, has perhaps never been adequately allowed for. Something, I think, is to be learnt from schoolboys in this matter, as witness another Johns Hopkins publication on the rudimentary society of a school in Maryland, noticed here some years ago. This line of speculation, however, is hardly germane to Dr. Andrews's matter.

Dr. Andrews hardly ever makes conjectures on his own account, and is generally a safe guide. He would have escaped one small puzzle (p. 91, note 1, on Bede's *possessio* = bócland) if he had remembered that Teutonic law knows nothing of the Roman *dominium*, and that in the official Latin of Western clerks down to the Carolingian period the highest possible degree of ownership is regularly expressed by *possessio* or *potestas* and their cognate words. F. P.

The Theory and Practice of Private International Law. By L. von Bar. Second Edition, Revised and Enlarged. Translated by G. R. Gillespie. 1892. Edinburgh: William Green & Sons. La. 8vo. xlvi and 1162 pp.

Professor L. von Bar's work on Private International Law was first published in 1862, the first English translation, that by Mr. Gillespie, appearing in 1883. Dr. Bar published his second edition in 1889, and is followed by Mr. Gillespie at a much shorter interval—a demonstration of the author's repute and of the increased importance of this department of law. The present book is rather a new treatise than a new edition, One subject—international criminal law—formerly included, is now omitted, but, on the other hand, not only are upwards of half a hundred pages given to 'copyright' and 'industrial property,' before unnoticed, but the residue, and more particularly 'nationality,' commercial law, including maritime law, and the subjects of territorial waters and extra-territoriality are discussed with completeness of detail where before there was but little more than a bare principle.

That portion of the work which relates to copyright, patents, trade-marks, designs, trade-names, and merchandise marks is peculiarly interesting as, examining the clauses of the international conventions in the light of previous continental opinions and decisions, it will, as English cases on the construction of the statutes and Orders in Council increase, enable the curious to appreciate the practical working of such treaties, the language of which, frequently drawn to meet continental understandings of the laws comes to be interpreted by English judges with the aid of precedent, establishing what it is possible that Professor von Bar might designate as arbitrary rules with arbitrary exceptions.

For purposes of the application of law in England, the perusal of the Seventh Book—the Law of Obligations—will afford the most instruction. Here the author comes nearer to English principles than elsewhere, and also treats, at a length by no means disproportionate to the value of the matter, some questions as to which English authority is scarce. It is to be remarked that Professor von Bar maintains that, in certain circumstances, compliance with the law which governs its substance ought to be sufficient for the form of a contract. English law has gone much further than that as to the execution of testamentary instruments, and if, in matters of contract, we adhere too strictly to the maxim 'locus regit actum,' there may arise, when much business is done hurriedly, much by travellers, much by telegram and telephone, a danger of the sacrifice of substantial justice to a rule useful as a general rule, but not of convenient application to all facts, and difficult to defend on principle apart from authority.

A paragraph and note at page 1068 suggest the reflection that if the ingenuity of mechanical engineers solves the problem of making aerial navigation practicable, lawyers may have to exercise themselves with some pretty points.

Mr. Gillespie's translation of the earlier edition is the best comment on the like difficult and laborious task which he has performed in respect of the present issue. The notes, appended in square brackets, in the same place and type as the text, are primarily intended for Scottish lawyers, but will be found of considerable use in England, notwithstanding a tendency to omit recent cases.

It is suggested to the editor that he might, perhaps, devise a more convenient plan for separating the text of the author from his own comment, in five places (pp. 290, 336, 771, 1125 and 1129), besides a sixth noted in the errata, there is a bracket omitted either at the beginning or end of a note, or entirely, and there may be more. Apart from accidents of that sort, it would be difficult for one consulting the book casually, and under pressure as to time, to ascertain what was text and what note.

If the learned reader buys this book he will have his reward when he has read it.

H. N.

The Scottish Poor Laws. By R. P. Lamond. Glasgow: Wm. Hodge & Co. 1892. 8vo. xvi and 398 pp.

This is something more than a mere law-book. It contains indeed sufficient information upon the various points with which the Courts have had to deal in relation to the poor; but the author further enters fully into the whole subject of the administration of the poor-laws, and brings much information to bear upon the discussion of questions of legislation.

To those familiar only with the English Poor Laws, it will perhaps be a surprise to learn that it is still the law in Scotland—a point of law not long ago settled by the highest authority on appeal to the House of Lords—that the able-bodied poor with their families have no right to relief out of the rates; and further that the persons who administer the funds under the poor-laws have no discretion to apply any part of the funds to the relief of the able-bodied. This was a principle of which the authorities of a now past generation—notably Dr. Chalmers—were very tenacious. Whether it can be long maintained under modern conditions, and perhaps less sturdy modern sentiments, is a question to which the author contributes some interesting suggestions.

In two concluding chapters, which will well repay the perusal, the author adverts to the problem of the limits of State interference, discusses various modern schemes for State-aided pensions and the like, and considers the true functions of charity in relation to the poor law.

R. C.

A Treatise on the Principles of the Law of Compensation. By C. H. Cripps, Q.C. London: Stevens & Sons, Lim. 1892. Third Edition. 8vo. lxiii and 532 pp. (20*s.*)

Since the second edition of this work was issued in 1884, three important legal events in connection with its subject have happened. The Arbitration Act (1889) has been passed; the *Stockport* case, 33 L. J., Q. B. 251, has been affirmed by the House of Lords in *Cowper Essex* v. *Acton Local Board*, 14 App. Cas. 153; and the Parliamentary Deposits and Bonds Act (1892) has been passed. The Arbitration Act has been remarkably well worked in, but Mr. Cripps has unhappily refrained from commenting generally on sect. 24, which applies the provision of that Act except *so far as they are*

inconsistent with the Lands Clauses Act, though he lays down, and we think correctly, on a particular point, that the Court or a Judge would probably not apply the 12th section of the Act in any case in which there is a *bona fide* question raised either as to the right to claim compensation, or as to the title of the claimant. The *Cowper Essex* case is also treated very well, our author merely stating its effect with becoming brevity, and sparing us any dissertations upon the curious conflict of judicial opinion as to the correctness of the *Stockport* case, which lasted for nearly thirty years.

On the Parliamentary Bonds and Deposits Act, 1892, we have not a word. This is of course excusable, as the date of the Act synchronizes with that of Mr. Cripps' preface. But though it may not have been worth while to keep back the book in order to include the Act, we think the omission to notice the long existing Parliamentary Standing Orders which it has turned into statute law is somewhat of a defect. The next chapter, treating of 'modifications of the Lands Clauses Acts,' by the Allotments and other Acts—*including* the Small Holdings Act, 1892 (wrongly cited as the Small Agricultural Holdings Act) would have been just the place for a notice of the Standing Orders on which the Parliamentary Bonds and Deposits Act is founded.

Beyond doubt, however, we have here a good book, well edited. We learn from the preface that some chapters have been to a great extent re-written, and that Mr. W. F. Craies has helped the author throughout in the preparation of the present edition. There is a full table of cases with references to all the reports, and a good collection of forms, which are as many as sixty in number. The Lands Clauses Acts, together with selections from the Housing of the Working Classes Act, are printed in the Appendix, and we are glad to observe that the preamble to the parent Act of 1845, so senselessly repealed for Statute Law Revision purposes, has been retained.

The Law of Horses. By D. Ross Stewart. Edinburgh: W. Green & Sons. 1892. 8vo. xx and 280 pp.

When Dr. Johnson defined oats as the food of men in Scotland and horses in England, Lord Elibank added, 'And where will you find finer men and finer horses?' Scotland, like Ithaca, is more famous for its men than its horses, yet we have only to glance through Mr. Stewart's work to see how large a body of law even in Scotland may grow up around a useful quadruped that like the horse figures in so many relations of life—that may be bought and sold, and hired and hypothecated, and sent by sea and land, and insured, and vivisected, and finally eaten under statutory conditions. In treating these matters Mr. Stewart has produced a really model text-book, well arranged, exact, exhaustive, concise, and clear, improved by all the mechanical aids of good paper, clear type, and conspicuous catch-words. Last, not least, all the cases are dated. Allowing for technical terms of Scotch law there is little difference between the substantive law in Scotland and England. A hirer of a horse in Scotland, however, had better remember that if the horse is injured while in his possession the burden is on him to prove that it was not his fault; also that if he hires a horse for a ride on the road he must not take it for a gallop in a grass field (*Seton* v. *Paterson*, 1880, 8 R. 236).

Travellers should note that a Scotch smith is not bound like an English smith to shoe a horse which is brought to him. A buyer too must beware of buying a stolen horse in Scotland: for in such a case the 'vitium reale'

follows the horse into the hands of even a purchaser for value in market overt: in fact the buyer cannot be too wide awake, for whatever else the countries may differ in they are alike in the frailty that attends horse bargains. It is to be feared that this was an early as it certainly is a later British characteristic, for do we not find Cicero writing 'Tu qui caeteris cavere didicisti, in Britannia ne ab essedariis decipiaris caveto?' The horse, it must be admitted, himself encourages frauds by his susceptibility to all sorts of complaints, latent and patent—complaints which the enterprising horse-dealer is obliged to disguise by 'gingering' and 'plugging' and 'pegging' and 'bishoping,' and other questionable arts. It is here we come upon the most material difference between the English and Scotch law. In England a warranty is a collateral contract, in Scotland it is an essential condition forming part of the contract for sale. Hence the Scotch buyer with a warranty of soundness cannot keep the horse with an abatement of the price. His only remedy is return.

The veterinary slang incident to this topic (and no blame to Mr. Stewart) is at times puzzling, especially when mixed with racy Scotticisms. We know, for instance, what is a roup, from recollections of Guy Mannering, but what is a 'slump price' and a 'white bonnet,' unless it is a puffer at an auction? Perhaps in a second edition of his excellent book Mr. Stewart will give us a glossary.

The Contract of Sale in the Civil Law with references to the Laws of England, Scotland and France. By J. B. Moyle. Oxford: Clarendon Press. 1892. 8vo. xiii and 271 pp. (10*s.* 6*d.*)

The Roman Law of Sale with modern illustrations. Digest XVIII. 1 *and XIX.* 1 *translated with notes and references to Cases and the Sale of Goods Bill.* By James Mackintosh. Edinburgh: T. & T. Clark. 1892. 8vo. xv and 272 pp.

The first of these books is written by the learned editor of the Institutes of Justinian. The 'experiment,' as he modestly calls it, is a very successful attempt to expound the law of Sale as laid down in the Corpus Iuris for the benefit of English lawyers. The general scheme of the book is to discuss the civil law in the text, and to point out the analogies with, and the differences from, English, Scotch and French law in the notes. The author is evidently a well-read and accomplished lawyer; his style is charming and his statement of the law is accurate.

The notes in the second of these books are intended to obviate the want of logical sequence in the discussion of topics in the Digest, and contain not only explanations adapted to the use of students of the Civil Law but useful comparisons of the Civil with the English and Scotch Law. We may safely congratulate the author on the accuracy and skill with which he has performed his task.

Students in the Inns of Court are compelled to pass an examination in Civil Law. To many of them this is most distasteful; the time that they spend in learning Civil Law seems to them to be lost; they do not see the connection between Civil and English Law. The student, however, who reads either of these books will find that while he learns Civil Law he also learns English Law.

These books bring out very clearly one of the fundamental differences between English and Civil Law, namely, that there are comparatively few technical terms in English Law. We distinguish between 'Emptio generis,'

'Emptio spei,' 'Emptio rei speratae,' 'Emptio ad gustum,' 'Emptio per aversionem,' and 'Emptio ad mensuram,' but we have no technical words to describe these different manners of sale.

The Corporation Duty. By Morton S. Jackson. London: Stevens & Sons, Lim. 1892. 8vo. viii and 220 pp. (7*s.* 6*d.*)

Mr. Jackson has not only a unique knowledge of the Corporation Duty, its origin, history, and working, but a lively style of writing which makes even a dry subject excellent reading.

The Corporation Duty, as most people know, was designed to end the 'indefensible immunity,' as Mr. Hubbard called it, of corporations to succession duty. It was a just tax, but it was a novel one, and the Legislature proceeding tentatively, as is the wont of the British Legislature, was over-liberal in the matter of exemptions. The result is that, what with excusing Friendly Societies and Trading Companies, and Local and Municipal Bodies, and Charitable and Religious and Literary and Scientific and Fine Art Associations, there is very little left to tax. Hence, though the annual income of corporations is over nine millions, the tax only produces some £40,000. Mr. Jackson evidently regards the present Act as only introducing the thin edge of the wedge, and discusses what he euphemistically calls 'the future possibilities' of the Duty; in other words, by a trifling omission of a few words, he offers the Chancellor of the Exchequer a quarter of a million instead of £40,000. This is tempting, for Mr. Jackson knows what he is talking about. It is time the 'exemptions' looked after themselves.

Commentaries on Equity Jurisprudence. By the Hon. Mr. Justice Story. Second English Edition by W. E. Grigsby. London: Stevens & Haynes. 1892. La. 8vo. xcvi and 1090 pp. (45*s.*)

Story's work has become a classic, and has passed beyond the zone of criticism. But Story's work in English garb has no such immunity. In Dr. Grigsby's laborious hands it has developed into a great book, we will not say a great evil. We have some difficulty in saying for what class of readers—practitioners or students—it is meant. Practising lawyers are more apt to turn to treatises on special subjects as their happy hunting-grounds. Students will be energetic indeed if they plod their way through eleven hundred closely-printed pages. This question however *solvitur ambulando.* The lapse of eight years calls for a new edition of the Anglicised Story which lies before us. The American cases and the paragraphs founded upon them have been eliminated by Dr. Grigsby, leaving nothing but Story as he may be quoted in the English Courts. Dr. Grigsby has done his work of editing and revising carefully, and on the whole well. But we think the judicial list with which the book is 'further enriched' (we quote the preface) might be brought down later than 1887 when the preface is dated June, 1892, and we should like to see more quotations from modern cases as distinguished from the old decisions to which it is difficult for student or practitioner to refer with profit. The man who quotes a single readable case quite upon the point does a far greater service than the man who accumulates a mass of authorities more or less ancient and more or less relevant.

The Statute Law of the Limitation of Actions. By Henry Thomas Banning. Second Edition, revised and enlarged. London: Stevens & Haynes. 1892. 8vo. xxxix and 385 pp. (16*s.*)

Happy is the subject the statutory portion of which is contained in forty pages of moderate dimensions. This is the case with the Statute Law of Limitation, no fraction of which, however minute, seems to have escaped Mr. Banning's ken. His treatise represents the case law upon the subject, and he refers to about a thousand decisions. He refers to them in a clear and succinct fashion, and the only thing he leaves to be desired is the date of each case. One page (p. 48) reminds us in appearance of an old 'Bill in Chancery,' in which letters used to be set out *verbatim* with their 'yours obediently' and 'your humble servant' in full. But this and a few mechanical slips are small things, detracting little from the sterling merits of a work which has profited by its fifteen years of legal career.

Practice in Lunacy. By Joseph Elmer. Seventh Edition. London: Stevens & Sons, Lmtd. 1892. 8vo. xx and 481 pp.

Of a book of practice which has run into a seventh edition in the hands of an official of the department in which the practice lies, it is unnecessary to say much. The success of such a book tells its own tale. It is found accurate and useful, or it would not flourish so well. It is natural to find a new edition of 'Elmer' called into being by the Lunacy Acts of the last two years, and it is equally natural for those accustomed to 'Elmer' to find it as carefully compiled and lucidly arranged as ever.

Die Behandlung der verwahrlosten und verbrecherischen Jugend und Vorschläge zur Reform. Von Dr. P. F. Aschrott. Berlin: Otto Liebmann. 1892. 8vo. iv and 64 pp.

The author of this pamphlet on the treatment of youthful criminals, whose excellent works on the English Poor Law and on Punishments in English Criminal Law have been noticed in this Review, is one of the best informed and most capable members of the school of criminal lawyers, led by Professor von Liszt, who advocate a clearer recognition of the distinction between casual and habitual criminals and wish to promote legislation which will, as far as possible, prevent individuals belonging to the former from drifting into the latter class. Among the measures intending to carry out that object those dealing with the mode of punishing and reforming offenders of immature age must naturally occupy a prominent place. Dr. Aschrott's suggestions deserve the careful attention of criminal lawyers and laymen who take an interest in the administration of criminal law.

Die Tierquälerei in der Strafgesetzgebung des In- und Auslandes, &c. Von Dr. Jur. Robert von Hippel. Berlin: Otto Liebmann. 1891. 8vo. viii and 198 pp.

This book gives an account of the statutory provisions relating to the prevention of cruelty to animals in Germany and other countries, and makes suggestions as to future legislation in Germany. The author in his reproduction of 12 & 13 Vict. c. 92 should have omitted the sections repealed by the Summary Jurisdiction Act 1884.

A Treatise upon the Employers' Liability Act of New South Wales. By C. G. WADE. Sydney: C. F. Maxwell. 1891. 8vo. xvi and 210 pp. (12*s.* 6*d.*)

THE New South Wales Act of 1891 differs little, and perhaps not essentially in any respect, from the English Act of 1880. Nor does it appear that the Colonial Courts have yet contributed much to the inevitable judicial commentary on the Act. The above work therefore differs little from the ordinary type of commentary upon a modern statute. The English decisions are freely cited, and the book may be useful to the English lawyer desirous of having this branch of the law brought up to date.

We have also received—

Church Law: being a Concise Dictionary of Statutes, Canons, Regulations, and Decided Cases affecting the Clergy and Laity. By BENJAMIN WHITEHEAD. London: Stevens & Sons, Lim. 1892. viii and 304 pp. (10*s.* 6*d.*)—This book consists of notes on various points of Ecclesiastical law, arranged in Dictionary form. It cannot supply the place of 'Phillimore' or 'Cripps' to the practising barrister, but it would be a very good thing if the bishops would insist on their clergy each possessing a copy, as the price is only 10*s.* 6*d.*, and the book contains a great deal of information of practical value.

Public Finance. By C. F. BASTABLE. London: Macmillan & Co. 1892. 8vo. xviii and 672 pp. (12*s.* 6*d.*)—This full and elaborate work has a legal aspect by reason of some chapters on the holding and administration of property by the State, and a series of chapters on taxation. Continental readers, for whom legal and political science are less distinct than for us, would probably classify it without more ado as a book on Public Law. This debateable ground between law, politics, and history, has received too little attention from English writers until quite lately. This book ought to be a valuable companion to Mr. H. Sidgwick's Elements of Politics, which lately broke new ground in this direction.

Traité élémentaire de droit civil germanique. Par ERNEST LEHR. Tome second. Paris: E. Plon Nourrit et Cie. 1892. 518 pp.—M. Lehr, who is honorary professor of comparative law of the University of Lausanne, and formerly lectured there, requires no introduction to those who study foreign law. Apart from his work in International law his books on English, German, Spanish, and Russian law are well known to all for whom French is the more convenient medium for obtaining information on these subjects.

The present volume deals with the law of contract of the family and of successions. The author has drawn into his analysis the changes and proposals of the German Draft Civil Code, and he has not omitted to preface each subject with historical notes, without which Germanic law would only appear as a muddled survival. There is a full index.

Sommaire périodique des Revues de Droit: 2e Année, No. 4, Avril 1892. Brussels: F. Larcier.—This publication is described as 'Table mensuelle de tous les articles et études juridiques publiés dans les périodiques belges et étrangers,' and professes to analyse the contents of more than two hundred legal periodicals. The work has every appearance of being carefully and methodically done, and the 'Sommaire périodique' should certainly find a place in all public law libraries. It will be useful to many Continental and to some English-speaking students.

De l'assurance contre les accidents du travail. Par VILLETARD DE PRUNIÈRES. Paris: Chevalier-Marescq et Cie. 1892. 458 pp.—The author of this treatise on a subject which is daily gaining importance has done good work in dealing so fully with all aspects of the subject. The question is still in a state when theory is welcome. It is therefore no objection to the book before us if alongside the law as applied in France it deals with the different schemes of reform which have been propounded. There is no index, though there is a full analytical table.

A Treatise on the Negligence of Municipal Corporations. By D. A. JONES. New York: Baker, Voorhis & Co. 1892. La. 8vo. lxviii and 588 pp. ($6.00 net).

Principles of the Criminal Law. By SEYMOUR F. HARRIS. Sixth Edition. By C. L. ATTENBOROUGH. London: Stevens & Haynes. 1892. 8vo. xxxix and 606 pp.

The Revised Reports. Edited by Sir FREDERICK POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. V. 1799–1801. 5 & 6 Vesey (to p. 616)—8 T. R.—1 East (to p. 138)—2 Bos. & P.—Forrest—1 & 2 Espinasse. London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co., 1892. La. 8vo. xiii and 798 pp. (25*s.*)

The Law relating to Building Societies. By E. A. WURTZBURG. Second Edition. London: Stevens & Sons, Lim. 1892. 8vo. xvi and 407 pp. (14*s.*)

The Law of Torts. By Sir FREDERICK POLLOCK, Bart. Third Edition. London: Stevens & Sons, Lim. 1892. 8vo. xl and 624 pp. (21*s.*)

The Law and Custom of the Constitution. Part I. Parliament. By Sir W. R. ANSON, Bart. Second Edition. Oxford: Clarendon Press. 1892. 8vo. xviii and 375 pp. (12*s.* 6*d.*)

Principles of the Law of Real Property. By the late JOSHUA WILLIAMS, Q.C. Seventeenth Edition, re-arranged and partly re-written by T. CYPRIAN WILLIAMS. London: Sweet & Maxwell, Lim. 1892. 8vo. lx and 703 pp. (21*s.*)

An Introduction to the History of the Law of Real Property. By KENELM E. DIGBY. Fourth Edition. Oxford: Clarendon Press. 1892. 8vo. xiv and 446 pp. (12*s.* 6*d.*)

A Manual of the Law relating to Small Agricultural Holdings, with The Small Holdings Act, 1892. By C. D. FORSTER. London: Stevens & Sons, Lim. 1892. 12mo. viii and 84 pp. (2*s.* 6*d.*)

The Statutes of Practical Utility. (1892.) Alphabetically arranged, with notes thereon, by J. M. LELY. Vol. III. Part 2. London: Sweet & Maxwell, Lim. and Stevens & Sons, Lim. 1892. 8vo. 295–601 pp. (12*s.*)

A Practical Treatise on the Law of Reparation. By A. T. GLEGG. Edinburgh: W. Green & Sons. 1892. La. 8vo. lvi and 551 pp. (25*s.*)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.